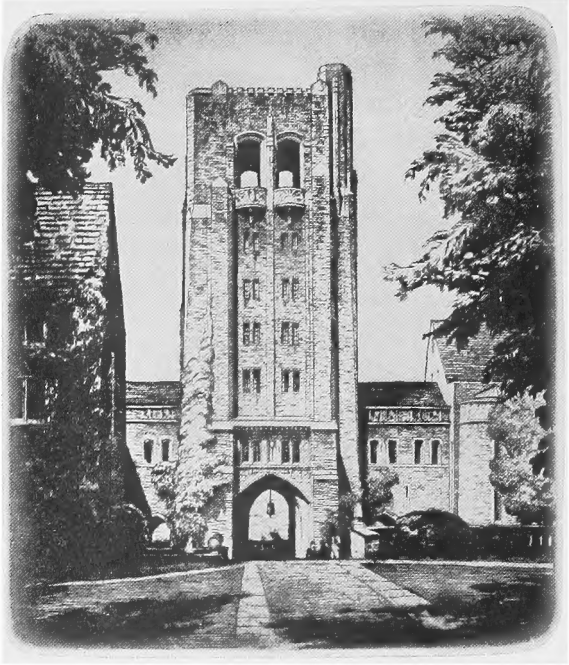




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The authors seem also to have taken pains to consult recent English decisions on questions, such as relating to foreign torts, on which the Indian case-law throws little light.”

“**Times of India**” (20th January 1899):—“The authors of this Treatise on Torts claim to have supplied a long-felt want. There is not, they say, a single work on the law of torts containing in one place a lucid exposition and methodical arrangement of all the principles of the English Common law and Indian case-law. Their object has been to produce a methodized treatise on the principles of tort, and their application as exemplified by the highest English, American and Indian authorities. The idea is an excellent one, and the authors have shown much ability, learning and diligence in carrying it out. . . . Laymen would probably be astonished if they were told that the law of torts intelligently handled and exemplified supplies excellent and interesting reading. If they will consider what a variety of topics fall to be included under the various ramifications of this great branch of the Common law, that there is hardly an incident or a daily acci-



dent of travel, or trade, administration, or conquest, which may not be properly discussed under torts, and that the scientific classification of the principles which connect this vast array of seemingly dissimilar material possesses more than a mere academic interest, they will better understand our assertion that every intelligent citizen might study this unpretentious volume with pleasure as well as profit. It is unfortunate that the lay mind is prejudiced against the surface technicalities of the law, and is apt to jump too hastily to the conclusion that its *arcana* are as ridiculous as they certainly are venerable. Ideal law should be the perfection of common sense, and in no department of its practical administration does it strive to approach that ideal more closely than in adjudicating upon the endlessly complicated wrongs which are broadly classified as being *ex delicto*. In the present work an attempt, and on the whole a very successful attempt, has been made to treat the whole subject scientifically and from the point of view of the jurist as well as of the daily practitioner. Numerous definitions of tort by the highest authorities introduce a capable analysis of the essential elements of the legal conception. General justifications of tort are next described, and those are naturally followed by an equally satisfactory examination of the various ways in which torts are discharged. A disquisition upon the liability for wrongs committed by others appropriately concludes the first and more general portion of the book. The learned authors then proceed to enter more particularly into their subject with a series of the best known classifications of torts. No one who has not attempted to define the various prominent features of this protean topic, can have any adequate idea of the difficulty it presents and the exact care required to make their definitions even passable. The early books were satisfied with a broad and sweeping terminology, which upon a careful comparison of the laboured subtleties and refinements of jurists like Pollock and Underhill, appears still to meet most satisfactorily the most practical requirements of the subject. It used to be said that all personal actions were *ex contractu* or *ex delicto*; to the former class belonged Debt, Covenant and Assumpsit; to the latter Detinue, Replevin, Trespass, and Trespass on the Case or more compendiously, Case. Every tort was said to arise out of Nonfeasance, Misfeasance or Malfeasance, and this classification, in spite of the objection taken by Innes that it leaves out of sight a vast array of rights which are neither founded in contract nor delict, is still almost as good as and much simpler than any other. It was once observed by Pratt, C.J., that torts are infinitely various, for there is not anything in nature that may not be converted into an instrument of mischief, and that pronouncement will explain why it is impossible to do more than glance at the methods which the learned authors of this work have followed in systematizing the illimitable materials with

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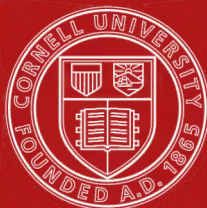
The English and Indian law of torts /



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ENGLISH AND INDIAN  
LAW OF TORTS.



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ENGLISH AND INDIAN  
LAW OF TORTS.

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## P R E F A C E

TO THE SECOND EDITION.

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AS there was no work, on the law of Torts, which contained a lucid exposition and a methodical arrangement both of the principles of the English Common law and of the Indian case-law, the writers of the present treatise conceived the idea of making an effort, to the best of their ability, towards supplying this long-felt *desideratum*. The generous reception accorded to the first edition and the demand made for more copies of it, during the last two years when the same was out of print, have induced them to prepare the second edition with the latest law of the subject carefully incorporated in it. During the five years which have elapsed since the publication of the first edition, there have been recorded in the reports numerous judicial decisions and *dicta* of great importance. It has, therefore, been found necessary to re-write some parts of the book in the fresh light of the recent law. A thorough threshing out of the old matter has also necessitated extensive alterations in the text, almost amounting to an entire recasting of the original compilation and particularly that portion of it which related to Indian law. The authorities on which it was based have been re-examined and verified, and nearly all cases, germane to the subject, including new ones, to be found in Moore's Indian Appeals; Law Reports, Indian Appeals; Bombay, Madras and North-West Pro-

vinces High Courts Reports; Bengal Law Reports; Calcutta Law Reports; Weekly Reporter; Indian Law Reports (four series); Punjab Record; Bombay Law Reporter; Calcutta Weekly Notes; Madras Law Journal; Allahabad Weekly Notes; Punjab Law Reporter; Burma Law Reports, &c., now find their place for the first time in this edition. Wherever there was a conflict of opinion between the different High Courts, the same has been duly traced and prominently noticed.

A general Introduction presenting at once a bird's-eye view of ruling principles and a concise summary of those principles for the use of students is, in this edition, prefixed to a detailed study of this interesting branch of Jurisprudence. One special feature maintained in the study of details is the distinctive exposition of principles apart from the facts of the cases from which they are evolved. Those principles are, in the first place, set out *in extenso*. They are then followed by cases illustrative of their application and effect, and they are further supplemented by cognate cases explanatory of their meaning. To draw the attention of the reader by mechanical aid, the titles of leading cases are printed in heavy type. The original plan of the work has been retained throughout except with one modification. The chapter on the general nature of remedies for torts, which was the last in the first edition, is shifted to the earlier pages and placed before the chapters relating to the classification and discussion of specific wrongs.

The first nine chapters are so designed as to present to the student a ground-work of or a preliminary discourse

on the whole subject. In the first chapter what amounts to a tort is broadly explained at considerable length. In the second are discussed the several elements, *e.g.*, intention, knowledge, motive, &c., which are considered as constituting a wrongful act, and the part which each plays in this branch of the law is exhaustively considered. The third chapter treats of the personal disabilities of such persons as can neither sue, nor be sued, in tort. The supposed rule of 'merger of trespass in felony' and its exclusion from the Indian law is next handled in chapter four. The fifth chapter deals with the conditions under which a remedy may be found in a British Court for a tort committed outside the limits of its territorial jurisdiction. In the sixth chapter are grouped together the general defences or justificatory pleas to an action of tort; and the writers are specially indebted to Sir Frederick Pollock's well-known treatise on the *Law of Torts*, for the order in which this part of the law is treated by them. The seventh chapter treats of the discharge of torts or the different modes in which the liability of a wrong-doer can be determined. Chapter eight is devoted to the constructive liability, so to speak, of certain classes of persons for wrongs committed by third parties, such liability arising either by ratification, or by virtue of their jural relations as master and servant, owner and his independent contractor, principal and agent, company and its directors, firm and its partners, guardian and ward, and, lastly, husband and wife. The classical works of Story, Lindley, Simpson and Pearson, have been freely made use of and cited on these points. The nature of different reliefs for torts is expounded in chapter nine.

After dealing in this wise with the general principles, the classifications of specific wrongs, as given by various text-writers, are set out in chapter ten. To frame a scheme of classification which shall be at once comprehensive, accurate and easily intelligible, is, it seems, a problem not yet solved; and scarcely two writers have agreed to one and the same or a uniform scheme. The classification adopted in this work is based on the lines of Sir Henry Finch's view of the subject. "Our law," says he in his *Discourse of Law*, "regards the person above his possessions—life and liberty most—freehold and inheritance above chattels, and chattels real above personal." Accordingly, torts relating to Person and Reputation precede in logical sequence those affecting Property—Real and then Personal, whilst those concerning Person and Property occupy the third place in the system.

The consideration of specific torts begins from the eleventh chapter with the law of Assault and Battery. The twelfth chapter is devoted to False Imprisonment. Chapter thirteen, on Defamation, is principally compiled from the learned and exhaustive monograph of Dr. Blake Odgers, K. C., and the very useful works of Flood and Folkard on the subject. The infringements of rights founded on domestic relations, such as depriving a husband of the society of his wife, a parent of the services and companionship of his daughter, a master of the services of his servant, and a ward of the protection of his guardian are discussed in chapter fourteen. The fifteenth treats of the various wrongs against good faith, excepting Deceit. The sixteenth disposes of torts to Realty or Immovable



Property, and in this chapter the law of the different classes of wrongs to Easements and Profits-a-prendre has been briefly sketched from the authoritative treatises of Gale and Goddard. The seventeenth deals with torts to Personalty or Movable Property, and the eighteenth with such species of Incorporeal Personal Property, as Patent, Copyright, Trademark, and Tradename. The nineteenth treats of Fraud and Misrepresentation, and the twentieth of Nuisances. Negligence is discussed in chapter twenty-one wherein it is considered in its three grades or stages, *viz.*, Neglect of duties requiring (1) ordinary, (2) more than ordinary, and (3) less than ordinary care. A great difference of opinion still exists among leading authorities with regard to this theory of the three degrees of negligence; and, according to Beven, even an attempt has been made to advance a counter theory with a view to impress some definite meaning on the historical, though often denounced, expression, "gross negligence." But this threefold division has, as Smith in his excellent work on Negligence observes, "the advantage of proceeding in some measure *super antiquas vias*, and it adapts itself to the increasing complexity of modern obligations. It cannot be doubted that with the progress of civilization a constantly increasing amount of care is required of men in proportion to the increased skill and intelligence which they are found to possess, to the increased difficulties of the duties which they undertake to perform, and to the keener sense of responsibility towards others which is characteristic of a more refined age." Though the general plan of this chapter and its sections are borrowed from Smith much

light has been admitted in the exposition of particular doctrines from the detailed treatment of them by Beven and the ingenious suggestions of Campbell. In addition to this series of specific wrongs there is a well-marked class of injuries which lies in the mid-lands, as it were, between the laws of Contract and of Tort. These are dealt with in the twenty-second and last chapter, under the head of "Torts founded on Contract." Throughout this treatise the nature of remedies and the measure of damages for each particular wrong have been fully given, so far as was practicable, in connection with it, and the masterly works of Mr. Mayne and Sedgwick have been largely drawn upon.

In the Appendix are collected together, in the order of the foregoing chapters of the treatise, select questions set at the Pleaders' and the University Law examinations held in the different Presidencies, within the last twenty-five years. These selections are chiefly intended to indicate to the student the various aspects of the same law from the manifold points of view of examiners, and, it is hoped, they will serve him as fairly searching tests for self-examination.

The Index, which closes the book, has been much enlarged and no pains have been spared to render it an efficient and convenient guide for ready reference to the body of the work itself.

*August, 1903.*

R. R.

D. K.

## LIST OF AUTHORS QUOTED OR CONSULTED.

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<i>Abbott</i> .....	Abbott's Law of Merchant Ships and Seamen.
<i>Addison</i> .....	Addison on Torts.
<i>Alexander</i> .....	Alexander's Indian Case Law on Torts.
<i>Anson</i> .....	Anson's Principles of English Law of Contract.
<i>Arnould</i> .....	Arnould on the Law of Marine Insurance.
<i>Austin</i> .....	Austin's Jurisprudence.
<i>Bacon</i> .....	Bacon's Abridgement of the Law.
<i>Ball</i> .....	Ball's Law of Torts and Contracts.
<i>Ball, L. C.</i> .....	Ball's Leading Cases on the Law of Torts.
<i>Beale</i> .....	Beale's Law of Bailments.
<i>Benjamin</i> .....	Benjamin's Treatise on the Law of Sale.
<i>Beven</i> .....	Beven's Negligence in Law.
<i>Bewes</i> .....	Bewes on Copyright and Patents.
„ .....	Bewes on the Law of Waste.
<i>Bigelow</i> .....	Bigelow's Law of Torts.
<i>Bigelow, L. C.</i> .....	Bigelow's Leading Cases on the Law of Torts.
<i>Blackstone</i> .....	Blackstone's Commentaries on the Laws of England.
<i>Brice</i> .....	Brice on Ultra Vires.
<i>Broom</i> .....	Broom's Common Law.
„ .....	Broom's Legal Maxims.
<i>Brown</i> .....	Brown's Law Dictionary and Institute of the whole Law.
<i>Bullen</i> .....	Bullen on Distress.
<i>Bullen and Leake</i> .....	Bullen and Leake's Precedents of Pleadings.
<i>Campbell</i> .....	Ruling Cases, edited by R. Campbell.
„ .....	Campbell's Law of Negligence.
<i>Carver</i> .....	Carver's Law of Carriage by Sea.
<i>Chitty</i> .....	Chitty's Treatise on the Law of Contracts.
<i>Clerk and Lindsell</i> .....	The Law of Torts by Clerk and Lindsell.
<i>Collett</i> .....	Collett's Law of Torts.
„ .....	Collett's Comments on the Indian Penal Code.
<i>Comyns</i> .....	Comyns' Digest of the Laws of England.
<i>Copinger</i> .....	Copinger's Law of Copyright in works of Literature and Art.
<i>Coulson and Forbes</i> .....	The Law of Waters by Coulson and Forbes.
<i>Dart</i> .....	Dart on Vendors and Purchasers.
<i>Dicey</i> .....	Dicey on Conflict of Laws.
<i>Domat</i> .....	Domat's Civil Law.

<i>Eddy</i> .....	Eddy on Combinations.
<i>Edmunds</i> .....	Edmunds on Patents.
<i>E. L. E.</i> .....	Encyclopædia of the Laws of England.
<i>Elton</i> .....	Elton's Law of Commons.
<i>Evans</i> .....	Evans' Treatise upon the Law of Principal and Agent in Contract and Tort.
<i>Eversley</i> .....	Eversley's Domestic Relations.
<i>Fawcett</i> .....	Fawcett's Law of Landlord and Tenant.
<i>Fletcher</i> .....	Fletcher on Light and Air.
<i>Flood</i> .....	Flood's Law of Slander and Libel.
<i>Foa</i> .....	Foa's Law of Landlord and Tenant.
<i>Folkard</i> .....	Folkard's Law of Slander and Libel.
<i>Fraser</i> .....	Fraser's Law of Torts.
<i>Fraser, L. &amp; S</i> .....	Fraser's Law of Libel and Slander.
<i>Gale</i> .....	Gale on Easements.
<i>Garrett</i> .....	Garrett's Law of Nuisance.
<i>Gilbert</i> .....	Gilbert's Law of Distress.
<i>Glen</i> .....	Glen's Law relating to Highways.
<i>Goddard</i> .....	Goddard's Treatise on the Law Easements.
<i>Hastings</i> .....	Hastings' Law of Fraud and Misrepresentation.
<i>Hindmarch</i> .....	Hindmarch's Law of Patents.
<i>Hodge</i> .....	Hodge's Treatise on the Law of Railways.
<i>Holland</i> .....	Holland's Elements of Jurisprudence.
<i>Hudson</i> .....	Hudson's Law of Light and Air.
<i>Indermaur</i> .....	Indermaur's Principles of Common Law.
<i>Innes</i> .....	Innes's Principles of Torts.
<i>Jones</i> .....	Jones on Bailments.
„ .....	Jones on Carriers.
<i>Joyce</i> .....	Joyce's Law and Practice of Injunctions.
<i>Kelly</i> .....	Kelly's Law of Newspaper Libel.
<i>Kerly</i> .....	Kerly on Trademarks.
<i>Kerr</i> .....	Kerr on Fraud and Mistake.
„ .....	Kerr on Injunctions.
<i>Lal Mohan Doss</i> .....	Law of Riparian Rights by Lal Mohan Doss.
<i>Lindley</i> .....	Lindley on Companies.
„ .....	Lindley on Partnership.
<i>Lush</i> .....	Lush on the Law of Husband and Wife.
<i>Macdonell</i> .....	Macdonell's Law of Master and Servant.
<i>Macnamara</i> .....	Macnamara's Law of Carriers.
<i>Macpherson</i> .....	Macpherson's Law of Railways and Common Carriers
<i>Markby</i> .....	Markby's Elements of Law.
<i>Mayne</i> .....	Mayne's Treatise on the Law of Damages.
„ .....	Mayne's Criminal Law of India.



<i>Odgers</i> .....	Odgers on Libel and Slander.
<i>P. &amp; M.</i> .....	Pollock and Maitland's History of English Law.
<i>P. &amp; W.</i> .....	Pollock and Wright's Possession in the Common Law.
<i>Paine</i> .....	Wyatt Paine on Bailments.
<i>Pearson</i> .....	Law of Agency in British India by T. A. Pearson.
<i>Piggott</i> .....	Piggott's Law of Torts.
<i>Pollock</i> .....	Pollock's Law of Fraud in British India.
„ .....	Pollock's Law of Torts.
<i>Porter</i> .....	Porter's Law of Insurance.
<i>Rattigan</i> .....	Rattigan's Indian Jurisprudence.
<i>Ringwood</i> .....	Ringwood's Outlines of the Law of Torts.
<i>Saunders</i> .....	Saunders's Law of Negligence.
<i>Savigny</i> .....	Savigny on Possession.
„ .....	Savigny on Obligations.
<i>Scrutton</i> .....	Scrutton's Law of Copyright.
<i>Sebastian</i> .....	Sebastian on the Law of Trademarks.
<i>Sedgwick</i> .....	Sedgwick on Damages.
<i>Shearwood</i> .....	Shearwood's Law of Negligence.
<i>Shirley</i> .....	Shirley's Leading Cases in Common Law.
<i>Simpson</i> .....	Simpson's Law of Infants.
<i>Smith</i> .....	Smith's Law of Master and Servant.
„ .....	Smith's Law of Negligence.
<i>Smith, L. C.</i> .....	Smith's Leading Cases in Common Law.
<i>Starkie</i> .....	Starkie's Law of Slander and Libel.
<i>Stephen</i> .....	Stephen's Commentaries on the Laws of England.
„ .....	General View of the Criminal Law of England.
<i>Stephen, H.</i> .....	H. Stephen's Law of Malicious Prosecutions.
<i>Stephen, H. L.</i> .....	H. L. Stephen's Law of Support and Subsidence.
<i>Story</i> .....	Story's Conflict of Laws.
„ .....	„ Law of Agency.
„ .....	„ Law of Bailments.
„ .....	„ Law of Partnership.
<i>Trevelyan</i> .....	Trevelyan's Law of Minors.
<i>Trevor</i> .....	Trevor's Law of Railways in India.
<i>Tudor</i> .....	Leading Cases in Mercantile and Maritime Law.
<i>Underhill</i> .....	Underhill's Summary of the Law of Torts.
<i>Viner</i> .....	Viner's Abridgment of Law and Equity.
<i>Wharton</i> .....	Wharton's Law of Negligence.
<i>Williams</i> .....	Williams on the Rights of Commons.
<i>Wright</i> .....	Wright's Law of Principal and Agent.
<i>Woodfall</i> .....	Woodfall's Law of Landlord and Tenant.
<i>Woolyrch</i> .....	Woolyrch on Waters.

## EXPLANATIONS OF ABBREVIATIONS.

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A. & E. ... ..	Adolphus and Ellis, 1834-1840; New Series, 1841-1852
A. C. ... ..	Appellate Cases, Law Reports, from 1891— [ K. B.
Agra. ... ..	Agra High Court Reports, 1866-1868.
All ... ..	Indian Law Report(s), Allahabad series, from 1876—
App. Cas. ... ..	Appellate Cases, Law Reports, 1876-1890.
Arn. ... ..	Arnold's Reports, 1838-1839. C. P.
Am. Rep... ..	American Reports.
Amb. ... ..	Ambler's Reports, 1737-1784. Ch.
Asp. ... ..	Aspinall's Maritime Cases, 1873-1878.
Atk. ... ..	Atkyns' Reports, 1836-1856. Ch.
A. W. N.... ..	Allahabad Weekly Notes, from 1881—
B. ... ..	Baron.
B. & A. ... ..	Barnewall and Alderson, 1817-1822. K. B.
B. & Ad... ..	Barnewall and Adolphus, 1830-1834. K. B.
B. & B. ... ..	Broderip and Bingham, 1819-1822. C. P.
B. & C. ... ..	Barewall and Creswell, 1822-1830. K. B.
B. & P. ... ..	Bosanquet and Fuller, 1796-1807. C. P.
B. & S. ... ..	Best and Smith, 1861-1869. Q. B.
B. L. R. ... ..	Bengal Law Reports, 1865-1875.
Br. & G. ... ..	Brownlow and Gouldesborough's Reports, 1569-1624. C. P.
Barnard ... ..	Barnardiston's Reports, 1740-1741.
Barne ... ..	Barne's Notes of Cases in Chancery, 1732-1760.
Beav. ... ..	Beaven's Reports, 1838-1866. Rolls.
Bing. ... ..	Bingham's Reports, 1822-1834. C. P.
Bing. N. C. ... ..	Bingham's New Cases, 1834-1840. C. P.
Blackf. ... ..	Blackford's Reports, 1817-1838, Indiana.
Bom. H. C. ... ..	Bombay High Court Reports, 1862-1875.
Bom. ... ..	Indian Law Reports, Bombay Series, from 1876—
Bom. L. R. ... ..	Bombay Law Reporter, from 1899—
Boul. ... ..	Boulnois' Reports, 1856-1859, Calcutta.
Bourke ... ..	Bourke's Reports, 1865. Calcutta.
Buls. ... ..	Bulstrode's Reports, 1609-1639. K. B.
Burma L. R. ... ..	Burma Law Reports, from 1896—
Burr. ... ..	Burrow's Reports, 1757-1771. K. B.
C. & E. ... ..	Cababe and Ellis, 1883-1884. N. P.
C. & J. ... ..	Crompton and Jervis, 1830-1832. K. B.

C. & K.	...	...	Carrington and Kirwan, 1843-1850. N. P.
C. & L.	...	...	Clerk and Lindsell's Law of Torts, 1896.
C. & M.	...	...	{ Carrington and Marshman 1840-1842. N. B. { Crompton and Meeson, 1832-1834. Exch.
C. M. & R.	...	...	Crompton, Meeson and Roscoe, 1834-1836. Exch.
C. & P.	...	...	Carrington and Payne, 1823-1841. N. P.
Cal.	...	...	Indian Law Reports, Calcutta Series, from 1876—
Cl. & F.	...	...	Clark and Finnelly, 1831-1846. H. L.
C. L. R.	...	...	Calcutta Law Reports, 1878-1883.
C. W. N.	...	...	Calcutta Weekly Notes, from 1896—
Camp.	...	...	Campbell's Reports, 1808-1816. N. P.
C. B.	...	...	Chief Baron.
C. B.	...	...	Common Bench Reports, 1845-1856. C. P.
C. B. N. S.	...	...	Common Bench, New Series, 1856-1865. C. P.
C. P. D.	...	...	Common Pleas Division, Law Reports, 1875-1890.
Ch.	...	...	Chancery, Law Reports, from 1891—
Ch. D.	...	...	Chancery Division, Law Reports, 1875-1890.
Civ. P. C.	...	...	Civil Procedure Code, Act XIV of 1882.
C. J.	...	...	Chief Justice.
Co.	...	...	Coke's Reports, 1752-1616.
Conn.	...	...	Connecticut, intermediate and last resort.
Cor.	...	...	Coryton's Reports, 1862-1863. Calcutta.
Cowp.	...	...	Cowper's Reports, 1774-1778. K. B.
Cox. C. C.	...	...	Cox's Criminal Cases, 1843—
Cr. R.	...	...	Criminal Rulings, 1869—Bombay.
Crim. P. C.	...	...	Criminal Procedure Code, Act X of 1882.
Cro. Car.	...	...	Croke's Reports in the Reign of King Charles I.
Cro. Eliz.	...	...	Croke's Reports in the Reign of Queen Elizabeth.
Cro. Jac.	...	...	Croke's Reports in the Reign of King James, 1582-1641.
Cush.	...	...	Cushing's Reports, Massachusetts.
D. & B.	...	...	Dearsley and Bell, 1856-1858. C. C.
D. & M.	...	...	Davison and Marivale, 1843-1844. Q. B.
D. & R.	...	...	Dowling and Rylands, 1821-1827. K. B.
D. & R.	...	...	Dowling and Rylands, 1822-1823. Nisi Prius Cases.
Dears.	...	...	Dearsley's Crown Cases, 1852-1856.
DeG. F. & J.	...	...	DeGex, Fisher, and Jones, 1859-1862.
DeG. J. & S.	...	..	„ Jones and Smith, 1862-1865.
DeG. M. & G.	...	..	„ Macnaghten and Gordon, 1851-1857.
DeG. & J.	...	..	„ and Jones, 1860-1862.
DeG. & S.	...	..	„ and Smale, 1846-1852.
Den. N. Y.	...	...	Denio, New York, intermediate and last resort.
Doug.	...	...	Douglas' Reports, 1778-1784. K. B.

Dowl. P. C.	...	...	Dowling's Practice Cases, 1830-1840. C. L. Courts.
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# INTRODUCTION.

## *General principles.*

A TORT is a wrong independent of contract, giving rise to a civil remedy. It is an act or omission which prejudicially affects another in some legal private right, that is, right in respect of either reputation, person and liberty, or property.

Tort differs from a contract in two ways : (1) a tort is inflicted against or without consent, a contract is founded upon consent ; (2) in tort no privity is needed, a contract necessitates privity between the parties to it. It can thus be distinguished from a pure breach of contract : (1) a tort is a violation of a right *in rem* (right vested in some person and available against the world at large), a breach of contract is an infringement of a right *in personam* (right available only against some determinate person or body) ; (2) motive is often taken into consideration in a case of tort, but it is immaterial in a breach of contract ; (3) in tort the measure of damages is not strictly limited nor capable of being indicated with precision, in a breach of contract the measure of damages is generally more or less nearly determined by the stipulations of the parties.

A tort also differs from a crime : (1) A tort is an infringement of the private rights belonging to individuals considered as individuals, a crime is a breach of public rights and duties which affect the whole community considered as a community ; (2) in tort, the wrong-doer has to compensate the injured party, in crime he is punished by the State ; in tort, the injured party brings an action, in crime proceedings are conducted in the name of the Sovereign.

To constitute a tort two things must concur : (1) a wrongful act committed by defendant, and (2) legal damage to plaintiff. An act is wrongful if it invades the private rights—*viz.*, the right of good reputation, the right of bodily safety and freedom, and the right of property—of another person.

Legal damage is not the same as actual damage. Every invasion of a plaintiff's right, or unauthorised interference with his property, imports legal damage.

In all cases of tort there must have been the infringement of a right, and this is expressed in the maxims that *injuria sine damno* is actionable, while *damnum sine injuria* is not actionable. By *damnum* is meant damage in the substantial sense of money,

loss of comfort, service, health, or the like. By *injuria* is meant an unauthorised interference with some general private right conferred by law on the plaintiff. It is an act or omission of which the law takes cognizance as a wrong. *Injuria sine damno*, therefore, means an infringement of a legal private right without any actual loss or damage. In this case the person whose right is infringed has a good cause of action. It is not necessary for him to prove any special damage, because every injury imports a damage when a man is thereby hindered of his right. Actual perceptible damage is not, therefore, indispensable as the foundation of an action; it is sufficient to shew the violation of a right in which case the law will presume damage. The law tolerates no further inquiry than whether there has been the violation of a right. If so the party injured is entitled to maintain his action for nominal damages in vindication of his right. This principle is firmly established by the election case of *Ashby v. White*. Thus in cases of libel, of trespass to land, and of the infringement of a patent, the mere wrongful act will be actionable without proof of special damage.

*Damnum sine injuria* means an actual and substantial loss without infringement of any legal right. In such case no action lies. For mere loss in money or money's worth does not of itself constitute legal damage. Loss or detriment is not a good ground of action, unless it is the result of a species of wrong of which the law takes cognizance. The *Gloucester Grammar School* case, and the underground water cases of *Acton v. Blundell* and *Chasemore v. Richards* fully illustrate that no action lies for mere damage, however substantial, caused without breach of law. There are moral wrongs for which the law gives no remedy, though they cause great loss or detriment.

There are, however, some instances of wrongs in which no action will lie unless actual or special damage to the plaintiff has been shown, *viz.*, (1) right to support of land as between adjacent landowners; (2) menace; (3) seduction; (4) slander; (5) deceit; (6) conspiracy or confederation; (7) waste; (8) distress damage-feasant; (9) nuisance consisting of damage to property; and (10) actions to procure persons to break their contracts with other persons.

'MALICE' is not essential to the maintenance of an action for tort. It is of two kinds, 'express malice' and 'malice in law' (or implied malice). The first is what is called malice in common acceptance, and means ill-will against a person: the second means a wrongful act done

intentionally without just cause or excuse (*Bromage v. Prosser*) where a man has a right to do an act, it is not possible to make his exercise of such right actionable by alleging or proving that his motive in the exercise was spite or malice in the popular sense (*Mogul S. S. Co. v. M'Gregor*). An act not otherwise unlawful cannot generally be made actionable by an averment that it was done with evil motive. A malicious motive *per se* does not amount to an injuria or legal wrong (*Allen v. Flood*).

The obligation to make reparation for the damage caused by a wrongful act arises from the fault, and not from the intention. Any invasion of the civil rights of another person is in itself a legal wrong, carrying with it liability to repair its necessary or natural consequences, in so far as these are injurious to the person whose right is infringed, whether the motive which prompted it be good, bad, or indifferent (*Allen v. Flood*). It is no defence to an action in tort for the wrong-doer to plead that he did not intend to cause damage, if damage has resulted owing to an act or omission on his part which is actively or passively the effect of his volition. A want of knowledge of the illegality of his act or omission affords no excuse, except where fraud or malice are the essence of that act or omission. For every man is presumed to intend and to know the natural and ordinary consequences of his acts (see p. 18). (*Guille v. Swan*, the balloon case. *Scott v. Shepherd*, the lighted squib case.)

THERE are certain persons who cannot sue in tort owing to personal disability. These are:—(1) A convict sentenced to *death* or *penal servitude* and who is not lawfully at large under any license. Such a person cannot sue for an injury to his property, but for any personal wrong, such as assault or slander, he can sue.

(2). An alien enemy cannot sue in his own right. He cannot maintain an action unless by virtue of an Order in Council, or duly licensed, or unless he comes into the British dominions under a flag of truce.

(3). A wife cannot sue her husband for a tort, nor can a husband his wife, upon the principle that husband and wife form in the eye of the law one person.

(4). A corporation cannot maintain an action for libel charging it with corruption.

(5). A child cannot maintain an action for injuries sustained while *en ventre sa mere*.

(6). A bankrupt cannot sue for wrongs affecting his property, but he can sue for personal wrongs such as assault or libel, &c.

The following persons cannot be sued in tort :—

(1). An action for a personal wrong will not lie against the Sovereign, for the "King can do no wrong."

(2). Foreign Sovereigns cannot be sued unless they themselves submit to the jurisdiction of a British Court and waive the privilege.

(3). Ambassadors of Foreign Powers, and their families and servants.

(4). Persons who from extreme youth or unsoundness of mind are mentally incapable of contriving fraud or malice. Such infants are not liable for torts in which the essence is malice or fraud. If there is a sufficient maturity of understanding in an infant, he will be liable for wrongs of commission as well as of omission. But if the tort arise out of a contract into which a person is incapable of entering by reason of infancy, such person cannot be liable for the tort (*Jennings v. Rundall*, case of over-working a hired horse). He cannot be made liable for a wrong committed in the course of the performance of the contract by changing the action to one of tort. Otherwise, there would be an end of that protection which the law affords to infants. But he would be liable where the tort is merely connected with, but does not properly arise out of the performance of a *de facto* contract (*Bernard v. Haggis*, case of using for jumping a horse hired for riding). An infant cannot take advantage of his own fraud, *i. e.*, he may be compelled to specific restitution, where it is possible, of anything he has obtained by deceit.

(5). A corporation cannot be sued unless (1) the act done is within the purpose of the incorporation, and (2) it has been done in such a manner as to constitute what would be an actionable wrong if done by a private individual. To render it liable the act done by a servant or a director of a corporation must be within the general scope of his authority (*Edwards v. Midland Ry.*; *Bank of New South Wales v. Owston*).

(6). A married woman at common law could not be sued unless her husband was joined with her as defendant. But now by virtue of the Married Women's Property Act, 1882, she can be sued alone for both ante-nuptial and post-nuptial torts, as if she were a *feme sole*, and her husband need not be joined with her as defendant. Any damages or costs recovered against her in any action shall now be payable out of her separate property. But this Act does not affect the common law liability of a husband for his wife's *post-nuptial* torts, and consequently a plaintiff can elect whether he would sue the wife alone or join her husband as co-defendant with her (*Seroka v. Kattenburg*). In respect of her *ante-nuptial* torts she may be sued alone and sums recovered against her are to be paid out

of her separate property. But her husband is liable to the extent of the property which he has obtained through her, and he may be sued either jointly with her or alone.

It was at one time supposed that there could not be a double proceeding, civil and criminal, in respect of the same act. If the act was a felony, it was said that it 'drowned the particular and private wrong.' This doctrine of the merger of the tort in the felony prevailed for a considerable time. Until 1870, on conviction of felony, the felon's property was forfeited to the Crown, and it was practically useless to bring an action. However in a very early case it was held that after a successful prosecution for felony an action of trespass might be brought in respect of the same wrong (*Dawkes v. Coveney*). The rule now is that the private remedy is not merged, but is only suspended until the injured party has performed his public duty, *i.e.*, prosecuted the wrong-doer for the crime (*Wells v. Abraham*; *Appleby v. Franklin*). The principle upon which the rule is founded seems to be that the law shall be vindicated before the individual who is wronged shall be permitted to have recourse to a civil remedy. The sole object of the law being to guard against stifling prosecutions. But the civil remedy is not available for a person who might have prosecuted the wrong-doer for the felony, and has failed to do so. The plaintiff ought to show (1) that the felon has actually been prosecuted to conviction (by any one and for any offence), or (2) that the prosecution is impossible, or (3) that he has failed to bring the offender to justice without any fault of his own.

The rule has, however, no application (1) to misdemeanours, (2) where the plaintiff is not the person injured by the felonious act of the defendant, and (3) where the defendant is some person other than the person guilty of the crime.

It may be remarked that much doubt has been thrown on the correctness of the rule in the cases of *The Midland Insurance Co. v. Smith* and *Ex parte Ball*. It has also no application in India.

Foreign torts. TORTS committed in a foreign country are triable in British Courts if they fulfil the following conditions :

(1). The wrong must be of such a character that it would have been actionable if committed in this country (*The Halley*).

(2). The act must not have been justifiable by the law of the place where it was committed (*Philips v. Eyre*). If the defend-

ant would not be liable abroad, civilly or criminally, for the act, no action would lie (*Machado v. Fontes*).

(3.) The act complained of must not be a tort of a purely local nature, such as a trespass on land (*British South African Co. v. The Companhia de Mocambique*).

THERE are certain justifications which when present will prevent an act from being wrongful. These Justifications. are: (1) acts of State, (2) judicial acts, (3) executive acts, (4) quasi-judicial acts, (5) parental and quasi-parental authority, (6) authorities of necessity, (7) damage incident to authorised acts, (8) inevitable accident, (9) exercise of common rights, (10) leave and license, (11) works of necessity, (12) private defence, (13) plaintiff a wrong-doer, and (14) acts causing slight harm.

RIGHT of action for a tort may be discharged by (1) death of the parties, (2) waiver, (3) accord and satisfaction, (4) release, (5) acquiescence, Discharge of torts. (6) judgment recovered, (7) bankruptcy, and (8) statutes of Limitation.

It was a principle of the common law that if an injury was done either to the person or property of another for which *damages* only could be recovered in satisfaction, the action died with the person *to* whom or *by* whom the wrong was done. This was embodied in the maxim *actio personalis moritur cum persona* (a personal right of action dies with the person). A personal action did not survive on the death, either of the person who sustained, or of the person who committed, the wrong (*Pulling v. Great Eastern Ry.*).

In case of the *death of the person injured*, his executors or administrators cannot, in consequence of the above maxim, maintain an action for an assault upon, or false imprisonment of, their deceased testator or intestate, or for a libel upon him, or for any act of negligence or violence not ending in death. Formerly, if damage was done to real property in the life-time of the testator, the heir-at-law, devisee, or remainderman, could not sue in respect of it; neither could the personal representative in consequence of this maxim. But several statutory exceptions have been engrafted on the maxim:—

(1). In case of an injury to goods and chattels of the deceased, the right of action survives to his executors and administrators (4 Edw. III. c. 7; 25 Edw. III. c. 5).

(2). In case of an injury to real estates of the deceased, for which he might have sued, his executors or administrators may bring an action, if (a) such injury has been committed



within six months before his death, and (b) such action is brought within one year after his death (3 & 4 Will. IV. c. 42, s. 2).

(3). Lord Campbell's Act enables the executor or administrator of a person whose death is caused by the wrongful act, neglect, or default of another, to bring an action for the benefit of the wife, husband, parent, or child, of the deceased (9 & 10 Vic. c. 93, s. 1).

(4). The Employer's Liability Act empowers the legal personal representatives of a workman who dies of injuries sustained whilst in his employer's service through any of the causes mentioned in the Act to bring an action for compensation against the employer (43 & 44 Vic. c. 42, s. 1).

In case of the *death of the tort-feasor*, if he has appropriated property, or the proceeds or value of property, belonging to another, and added to his own estate or moneys, an action shall survive against his executor (*Phillips v. Homfray*). No action, however, lies against the executor for any trespass committed by him, or for any act of his negligence or fraud, if his estate has derived no benefit therefrom. But it has been enacted that an action may be maintained against the executor or administrator of any deceased person for any wrong committed by him in respect of the property of another, if (a) such injury shall have been committed within six months before his death, and (b) such action shall be brought within six months after such executor or administrator shall have taken upon himself the administration of the estate of such person (3 & 4 Will. IV. c. 42, s. 2).

A PERSON may be liable in respect of wrongful acts of another in three ways : (i) as having ratified the particular act; (ii) as having stood in some relation with the other so as to entail responsibility for the torts committed by that person; and (iii) as having abetted the tortious acts committed by others.

I. An act done, *for another*, by a person not assuming to act for himself, but for such other person, though without any precedent authority whatever, becomes the act of the principal if subsequently ratified by him. *Omnis ratihabitio retrotrahitur, et mandato priori equiparatur* (every ratification is retrospective and is of equal force with a previous command). This maxim is not confined to contracts only, it applies to torts as well (*Wilson v. Tummam*). The principal is bound by the act, whether it be for his detriment or his advantage, to the same extent as if the act was done by his previous authority. Only such acts bind a principal by subsequent ratification as were

done at the time on his behalf. What is done by a person on his own account cannot be effectually adopted by another. Ratification of a tort by a principal will not, however, free the agent from his responsibility to third persons. But a ratification may *avoid* instead of creating a liability (*Buron v. Denman*).

II. Liability for wrongful acts also arises from the relation existing between master and servant, or owner and independent contractor, or principal and agent, or company and director, or firm

and partner, or guardian and ward, or lastly, husband and wife.

The relation between master and servant gives rise to the liability (1) of master to third persons, (2) of servant to third persons, (3) of master to servants, and (4) of servant to master.

(1). A master is liable to third persons for every such wrong of his servant as is committed in the course of his employment, and for the master's benefit, although the master did not

Master's liability to others.

authorize, or was not cognisant of, or had even expressly forbidden the act or omission in question (*Barwick v. English Joint Stock Bank*). But a master is not liable for the torts of his servant in any matter beyond the scope of the employment, even if done for his benefit, unless he has expressly authorised them to be done. If the true character of the act of the servant be that it was an act of his own, and done in order to effect a purpose of his own, the master is not liable for it.

A master, according to Pollock, becomes liable for the wrong done by a servant in the course of his employment in the following manner :—

(i). The wrong may be the natural consequence of something being done by a servant with ordinary care in execution of the master's specific orders (*Gregory v. Piper*, the rubbish case).

(ii). The wrong may be due to the servant's want of care in the carrying on of the work or business in which he is employed (*Whatman v. Pearson*, case of leaving horse and cart unattended). But if a servant acts in such disobedience to the instructions of his master as to be altogether outside the course of his duty, or in such a way as to be on a frolic of his own, then the master will not be liable (*William v. Jones*, pipe case; *Storey v. Ashton*, case of a car-man going in another direction).

(iii). The servant's wrong in excess or mistaken execution of a lawful authority. Here it must be shown (a) that the servant intended to do on behalf of his master something of a kind which he was in fact authorized to do, and (b) that the act, if done in a proper manner, or under the circumstances erroneously supposed by the servant to exist, would have been lawful (*Bayley v. M. S. & L. Ry.*, case of pulling out of a carriage ;

*Goff v. G. N. Ry.*, case of mistaken arrest). But if the servant does some tortious act which is outside the scope of his authority, or which his master would have had no power to do himself, and has not specially authorised, the master will not be answerable for it (*Poulton v. L. N. S. W. Ry.*, case of wrongful detention of plaintiff; *Allen v. L. & S. W. Ry.*, robbing of the till case; *Edwards v. L. & N. W. Ry.*, case of foreman porter giving in charge an innocent person for stealing).

(iv). A wilful wrong, such as assault, provided the act is done on the master's behalf and with the intention of serving his purposes (*Limpus v. London General Omnibus Co.*, case of upsetting an omnibus).

A master is not responsible for the act of his servant (1) where he has temporarily lent the servant to another person, and (2) where he has been obliged by law to employ a particular person, *e.g.*, compulsory pilot.

(2). A servant is under no liability to third persons in respect of acts of non-feasance or negligence in the performance of his duty, but as regards acts of misfeasance or positive wrong he is liable. Whoever commits a wrong intentionally or ignorantly, is liable for it himself, and it is no excuse that he was acting as an agent or servant on behalf of, and for the benefit of, another. For a master cannot confer upon a servant any authority to commit a tort upon the rights or property of another.

(3). A master will be liable to his servant, for injuries received by him during service, in three ways: (i) at Common law; (ii) under the Employer's Liability Act, 1880; and (iii) under Workmen's Compensation Acts, 1897 and 1900.

(i). According to Common law a master is not liable to his servant for injuries received from any ordinary risk of, or incident to, the service, including acts or defaults of any other person employed in the same service (*Priestly v. Fowler*). The master is not liable if he can show that the servant injured had assented to undertaking the risk of injury when he entered the employment. But nothing short of assent would do. Mere knowledge that there was a risk was never a sufficient defence. *Volenti non fit injuria* and *scienti non fit injuria* are not the same thing (*Yarmouth v. France*). Again, if the person occasioning, and the person suffering, the personal injury, are fellow-workmen engaged in a common employment, and under a common master, such master is not responsible for the results of the injury. Common employment does not necessarily imply that both servants should be engaged in precisely the same or even similar

acts. All persons engaged under the *same* employer for the purposes of the same business, however different in detail those purposes may be, are fellow-servants in a common employment. There must not only be common employment, but common employment under the master whose servant was guilty of negligence. The rule will apply even when a person is only temporarily or for a particular occasion in the service of another; and where a person volunteers to assist the servant of another in his work. At Common law the following duties are imposed on a master or an employer:—

(a). He must provide proper and competent fellow-servants.

(b). He must take all reasonable precautions to secure the safety of his servants or workmen.

(c). He should not be guilty of personal negligence causing injury to the servants (*Smith v. Baker*).

(ii). The Employer's Liability Act has so far expanded the employer's responsibility as to make him liable for the negligent acts or default of those to whom he has delegated his duties of control and management and of those whom he has placed in positions of authority over his workmen (see p. 111). Under this Act it was held to be a valid defence to plead that the workman had contracted himself out of the rights conferred by the Act (*Griffiths v. Earl of Dudley*); or that he was guilty of contributory negligence.

(iii). The Workmen's Compensation Acts, 1897 and 1900, are supplemental to the above Act. The first Act introduces a liability not founded upon any breach of duty, either at Common law or under a statute. The second extends the provisions of the first to the employment of workmen in agriculture. The maxims *actio personalis moritur cum persona* and *volenti non fit injuria* do not apply to cases brought under these Acts. These Acts practically make it a term of the contract between employer and employed that the employer shall compensate the workman for any injury he receives, not caused by his own wilful misconduct, in the course of employment.

(4). A servant is liable to his master for the consequences of his non-feasances or wrongful omissions. If damages have been recovered from the master by reason of the servant's negligence, the master can recover these damages from the servant.

An independent contractor is one who undertakes to produce a given result, without being in any way controlled as to the method by which he attains that result. If such independent contractor is employed to do a lawful act, and in the course of the work he or his servants commit some casual act of wrong or

negligence, the employer is not answerable (*Pickard v. Smith*). For, he who controls the work is answerable for the workman; the remoter employer who does not control is not answerable. One employing another is not liable for his collateral negligence unless the relation of master and servant existed between them. The test whether a man employed to do work is a servant or an independent contractor is the question: Does the employer exercise, or has he right to exercise, control over the workman, and direct him how to do his work. If so, the relation is that of master and servant, and not of owner and independent contractor. There are five exceptions to the rule that a person employing an independent contractor is not liable for his wrongful acts:—

(1). Where the employer retains his control over the contractor, and personally interferes and makes himself a party to the act which occasions the damage (*Burgess v. Gray*).

(2). Where the thing contracted to be done is itself illegal (*Ellis v. Sheffield Gas Co.*; *Angus v. Dalton*).

(3). Where a legal or statutory duty is incumbent on the employer to carry out a particular work efficiently, and the contractor either omits or imperfectly performs such duty (*Grey v. Pullen*; *Hole v. Sittingbourne*).

(4). Where the thing contracted to be done, although lawful in itself, is likely, in the ordinary course of events, to damage another's property unless preventive means are adopted, and the contractor omits to adopt such means (*Hughes v. Percival*; *Bower v. Peate*; *Angus v. Dalton*).

(5). Under the Workmen's Compensation Act, 1897, s. 4, if 'undertakers' employ a contractor, such contractor's servants can recover compensation from the 'undertakers.'

To make a principal responsible for a wrongful act of his agent it is necessary to show (1) that he has authorised the act, or (2) that it was done on his behalf and he has ratified it, or (3) that it was committed for his benefit by the agent in the course and as part of his employment. In the third case the principal will be liable even though he has expressly forbidden the act. The maxim *respondet superior* (let the principal be liable) does not render a principal liable for the wrongs of his agent, if the agent has been dealt with as a principal.

Agents can be classified as private and public. Private agents are personally liable to third persons for acts of misfeasance or positive wrongs. For acts of nonfeasance or mere omissions of duty, they are not liable to third persons but solely to their principals. Public agents are personally liable to third persons

for their malfeasances, misfeasances, or nonfeasances. The Government is not responsible in any case, for it does not undertake to guarantee to any persons the fidelity of any of the officers or agents whom it employs.

Companies are liable for the torts committed by their servants in the course of their employment. But the wrongful act complained of should be *intra vires* and not *ultra vires*, and should be done for the company. Directors are personally responsible for any tort which they may themselves commit or direct others to commit, although it may be for the benefit of the company.

The relation of partners *inter se* is that of principal and agent, and each partner is therefore liable to third persons for the neglect or fraud of his fellow-partner. The neglect or fraud complained of must have been committed in the ordinary course of the partnership business; and while the partner is acting within the scope of his authority. Co-partner's complete innocence is irrelevant.

Guardians are not personally liable for torts committed by their wards.

Liability by abetment.

III. In actions of wrong, those who abet the tortious acts are equally liable with those who commit them.

REMEDIES for torts are of two kinds: judicial, and extra-judicial. Judicial remedies are those which are afforded by the act of law, *viz.*, awarding of damages, and the granting of injunction. Remedies. Extra-judicial are those which are available to a party in certain cases of torts by his own acts alone, *viz.*, expulsion of trespasser, re-entry on land, recaption of goods, distress damage feasant, abatement of nuisance.

Damages are the pecuniary satisfaction which a plaintiff may obtain by success in an action. The defendant is liable for the natural (or probable) and ordinary consequences of his act. He is liable for such damages as he in fact contemplated or ought to have contemplated when he committed the tort (*Scott v. Shepherd*, the lighted squib case; *Vandenburgh v. Truax*, the pick-axe case; *Bailiffs of Romney Marsh v. Trinity House*, the sea wall case; *Powell v. Deveney*, the truck case; *Clark v. Chambers*, the spike case). The defendant is liable if the act is of such a nature that injurious consequences might have been anticipated from it.

Law will permit no damages to be recovered excepting such as are the natural and legal consequences of a wrongful act. *In jure non remota causa sed proxima spectatur* (in law the immediate or proximate, not the remote, cause of any event is regarded). Damage is said to be too remote when, although arising out of the cause of action, it does not so immediately and necessarily flow from it as that the offending party can be made responsible for it. Damage will be excluded as too remote.—

(1). Where it is neither the necessary nor the probable result of the defendant's act, nor is it such as can be shown to have been in his contemplation when he committed the act (*Sharp v. Powell*, van washing case).

(2). Where it is caused, wholly or principally, by the act of the plaintiff himself (*Glover v. L. & S. W. Ry.*, the race glass case).

(3). Where it is the wrongful act of a third party such as could not naturally be contemplated as likely to spring from the defendant's conduct (*Vicars v. Wilcocks*).

Kinds of damages. There are four kinds of damages : contemptuous ; nominal ; substantial ; and exemplary.

(1). Contemptuous damages are awarded when it is considered that an action should never have been brought.

(2). Nominal damages means a sum of money that may be spoken of, but that has no existence in point of quantity. Nominal damages are awarded where an action was a proper one to bring, but the plaintiff has not suffered any special damage, and does not desire to put money into his pocket. Such damages are given where the purpose of the action is merely to establish a right, *e.g.*, trespass, invasion of a right of easement. Every infringement of a right involves a claim to nominal damages, which may be one shilling or a farthing.

(3). Substantial or ordinary damages are awarded where it is necessary to fairly compensate the plaintiff for the injury he has in fact sustained. The law does not aim at *restitution* but *compensation*, and the true test is, what sum would afford, under the circumstances of each particular case, a fair and reasonable compensation to the party wronged for the injury done him. The plaintiff's own estimate is regarded as the maximum limit.

(4). Exemplary damages are awarded wherever the wrong or injury is of a grivous nature, done with a high-hand, or is accompanied with a deliberate intention to injure, or with words of contumely and abuse, *e.g.*, defamation, seduction of a man's daughter, malicious prosecution. In such cases the injury done

is so grave and of so reprehensible a character that it is next to impossible to measure damages by any strict numerical rule. The object of giving exemplary damages is to make a public example of the defendant to deter all others from the commission of similar acts.

In cases of torts a Court interferes by injunction to prevent the infringement or disturbance of a right or for the purpose of better enforcing rights, or preventing mischief until such rights have been ascertained, or where the remedy of damages would be inadequate or practically worthless. Before granting an injunction the Court (1) must be satisfied that the injury which is apprehended will be either continuous, or frequently repeated, or very serious; (2) must consider what relation the damage which would be caused to the plaintiff by refusing the injunction and to the defendant by granting it bear to one another; (3) must consider the interests of third persons in such cases; and (4) must consider whether the plaintiff by his acquiescence in the defendant's conduct has caused him to alter his position.

The liability of the wrong-doer in tort is joint and several. To constitute a joint liability the act complained of must be joint, not separate. It should be noted that—

(1). Joint tort-feasors may be sued jointly or severally. If sued jointly, the damages may be levied from all or either.

(2). A judgment against one or more of several tort-feasors is a bar to any further action against the others, even though it remains unsatisfied.

(3). A release granted to one or more of the several tort-feasors operates as a discharge of the others.

No action for contribution is maintainable by one wrong-doer against another, although the one who seeks contribution may have been compelled to satisfy the full amount of damages (*Merryweather v. Nixan*); provided the wrong done is so obviously unlawful that no reasonable man in committing it could suppose that he was doing a lawful act (*Adamson v. Jarvis*). This principle is based on the maxim *ex turpi causa non oritur actio*. But this rule does not extend—(1). To cases of indemnity, where one man employs another to do acts, not unlawful, for asserting a right. (2). Where one party induces another to do an act which is not legally supportable, and yet is not clearly in itself a breach of law, then the party so inducing shall be answerable to the other for the consequences. (3). Where defendants have acted under a *bona fide* claim of right, and have



reason to suppose that they had a right to do what they did, then they may have a right of contribution *inter se*.

•      *Torts to Person.*

AN assault is the unlawful laying of hands on another person, or an attempt or offer to do a corporal hurt to another, coupled with an apparent present ability and intention to do the act.

Assault.

It is not every threat, when there is no actual personal violence, that constitutes an assault ; there must in all cases be the means of carrying the threat into effect (*Stephen v. Myers*, parish meeting case ; *Cama v. Morgan*). The holding up a fist or shaking a whip, when near enough to be able to hit, is an assault. If a sword is flourished at such a distance that it would be impossible to hurt any person, it would not be an assault. It is the ability to do harm that is the essence of this wrong. Mere words do not amount to an assault. But the words which the party threatening uses at the time may either give to his gestures such a meaning as may make them amount to an assault, or may prevent them from doing so.

A battery is the actual and unwarrantable striking of another person, or touching him in a rude, angry, revengeful, or insolent manner (*Cole v. Turner*), e.g., pouring water on a person,

Battery.

or spitting in his face. It includes assault ; and is mainly distinguishable from the latter in the fact that physical contact is necessary to accomplish it. It does not matter whether the force is applied directly or indirectly to the human body itself or to anything in contact with it ; nor whether with the hand or anything held in it. But every laying on of hands is not a battery, for the party's intention must be considered. Again, consent is not always a defence to a battery. Prize-fighters are guilty of battery though the meetings are by consent.

Assault and battery may be justified in the following cases : (1) Self-defence ; or in defence of one's wife or husband, children, parents, or one's master. (2) In defence of the possession of a house, or goods and chattels. (3) To prevent a forcible entry or seizure of chattels. (4) For the correction of a pupil, child, apprentice, or sailor on board a ship. (5) By leave and license of the party injured. (6) In the preservation of the public peace. (7) Duty of lawful arrest by an officer of Justice. (8) Misadventure.

Mayhem is a bodily harm whereby a man is deprived of the use of any member of his body or of any sense which he can use in fighting to defend himself or annoy his enemy, or by reason of which he is generally and permanently weakened; *e. g.*, the cutting off, or disabling, or weakening a man's hand or finger, striking out his eye or fore-tooth.

FALSE IMPRISONMENT is a trespass committed by one man against the person of another, by unlawfully arresting him, and detaining him, without any legal authority. To constitute this wrong two things are necessary:—(1). The detention of the person either (a) actual, *e. g.*, laying hands upon a person; or (b) constructive, *e. g.*, by an officer telling any one that he is wanted and making him accompany (*Grainger v. Hill*). (2). The unlawfulness of such detention. There must be a *total* restraint for some period upon the liberty of another without sufficient legal authority. A *partial* obstruction of his will, as the prevention of his going in one direction or in all directions but one, does not constitute an imprisonment (*Bird v. Jones*). There must be such a detainer as to limit the plaintiff's freedom of locomotion in *all* directions. If there be one way of escape there is no arrest and no false imprisonment. The plaintiff need only prove the detention or imprisonment. But detention is justifiable under certain circumstances: (1) A defendant can show that he acted under a legal and legally executed warrant. If there was no warrant for the arrest, then the law differs according as the defendant is a constable, or a private person. A constable may arrest (i) any one whom he *suspects* to have committed a felony; (ii) in order to prevent a breach of the peace, or whenever a breach of the peace has been committed in his presence; and (iii) under certain statutes. A private person may arrest (i) any one whom he suspects to have committed a felony, provided that a felony has *actually* been committed; (ii) to stay a breach of the peace; (iii) his bail, *i. e.*, any person for whom he has become bail; and (iv) under certain statutes. (2). There are various persons who are, from their positions, naturally justified in detaining certain persons to whom they stand in a peculiar relation, *e. g.*, a father his child, or a commanding officer his inferior.

THE wrong of defamation may be committed either by way of writing (or its equivalent), or by way of speech. The term 'libel' is used for the former kind of utterances, and 'slander' for the latter.

A libel is a publication of a false and defamatory statement, expressed in printing or writing, or by signs, pictures, &c., tending to injure the reputation of another, and thereby exposing such person to public hatred, contempt, or ridicule. A slander is a false and defamatory verbal statement tending to injure the reputation of another. By reputation is meant the opinion of the world in general. Libel differs from slander in several respects:— (1) Libel is addressed to the eye: slander to the ear. (2) Libel is a criminal offence as well as a civil wrong: slander is a civil wrong only. (3) In libel the law presumes that the person defamed has suffered damage: slander is actionable only when special damage can be proved to have been its natural consequences, or when it conveys certain imputations. (4) In libel the defamatory matter is in some permanent form: slander is in its nature transient. (5) Libel shows greater deliberation and raises a suggestion of malice: slander may be uttered in the heat of the moment, and under a sudden provocation. (6) The actual publisher of a libel may be an innocent person, and, therefore, not liable: in every case of republication of a slander, the publisher acts consciously and voluntarily and must necessarily be guilty. (7) Under the English statute of limitation an action of libel is barred after six years, but of slander after two.

To support an action for libel the statement complained of must (1) be false, (2) be defamatory, and (3) have been published.

(1). It is not necessary for the plaintiff to prove *falsehood* but for the defendant to prove truth of the words. If a man is proved to have stated that which he knew to be false no one need inquire further.

(2). Any words will be deemed *defamatory* which expose the plaintiff to hatred, contempt, ridicule, or obloquy, or which tend to injure him in his profession or trade, or which cause him to be shunned or avoided by society. It is for the plaintiff to show that the words complained of were understood in a defamatory sense. Where the words are not *prima facie* defamatory, but the plaintiff intends to maintain that they were defamatory by reason of their being understood in a special sense, he must insert an averment called an *innuendo*. The purpose of inserting an *innuendo* is to point out a secondary meaning in which the words are defamatory (see p. 179). The defamatory words must also refer to some ascertained or ascertainable person, and, that person must be the plaintiff. The plaintiff must prove a definite imputation on some definite person, who must be none but himself. Further, the words must concern the plaintiff, *i. e.*,

must affect his character or touch him in the way of his office, profession, or trade (*Capital & County Bank v. Henty*).

(3). As regards *publication* it may be observed that the making known, knowingly or negligently, of a libel or slander to any person, other than the object of it, is publication in its legal sense. The plaintiff must prove the publication of the libel by the defendant. It is the publication not the composition of the libel that is the gist of the action. Every sale and delivery of a libel is a fresh publication thereof; and each publication gives a fresh cause of action.

In the case of slander, in addition to the three requisites which are necessary to be alleged in an action of libel, it must further be shown that some special damage has resulted from the use of the words complained of. Such damage must be the legal and natural consequence of the slander. But an action of slander may be maintained, without proof of special damage, in the following cases :—

(1). If a criminal offence (not necessarily an indictable offence) be imputed to the plaintiff (*Peake v. Oldham*; *Holt v. Scholefield*).

(2). If a contagious or infectious disorder, tending to exclude the plaintiff from society, be imputed to him (*Carslake v. Mapledoram*).

(3). If any injurious imputation be made, affecting the plaintiff in his office, profession, or trade (*Lumby v. Allday*).

(4). If the plaintiff is a woman or girl, and the words impute unchastity or adultery to her (Slander of Women Act, 1891).

Every repetition of defamatory words is a new publication and a distinct cause of action. An action will lie eventhough the statement complained of was a current rumour and the defendant *bona fide* believed it to be true. If the damage arise simply from the repetition the originator will not be liable, except, (i) where the originator had authorised the repetition; or (ii) where an actual duty is cast upon the person to whom the slander is uttered to communicate what he has heard to some third person.

The defences peculiar to an action of libel or slander are:—

Defences, (1) Truth, (2) Fair comment, and (3) Privilege.

(1). The truth of any defamatory words is a complete defence to an action of libel or slander. For law will not permit a man to recover damages in respect to an injury to character which he

either does not, or ought not to, possess. The onus of proving the truth of the words complained of lies upon the defendant. If the matter is true the purpose or motive with which it was published is irrelevant. The defendant must show that the imputation made by him was true as a *whole* and in every *material* part thereof. It is enough if the statement though not perfectly accurate is *substantially* true. If there is gross exaggeration the plea of justification will fail.

- (2). Fair and *bona fide* comment on matters of public interest are not libellous, however severe in their terms, unless they are written intemperately and maliciously (*Campbell v. Spottiswoode*).

Fair comment.

(For matters which are of public interest, see p. 203). The comment must be *bona fide* and must not be made a cloak for malice. Legitimate criticism is no tort, should loss ensue to the plaintiff it would be *damnum sine injuria*. But (i) the words published must be fairly relevant to some matter of public interest; (ii) they must be the expression of an opinion, and not the allegation of a fact; (iii) they must not exceed the limits of a fair comment; and (iv) they must not be published maliciously.

- (3). Where a person stands in such a relation to the facts of the case that he is justified in saying or writing what would be slanderous or libellous in any one else, he is said to have a privilege.

Privilege.

There are occasions on which it is right that one man should speak about another and state fully and freely what he honestly believes to be the truth as to his character or means. Such occasions are deemed in law to be privileged. Privileged occasions are of two kinds: (i) those absolutely privileged, and (ii) those in which the privilege is but qualified. On certain occasions the interests of society require that a man should speak out his mind fully and frankly without thought or fear of consequences. To such occasions the law attaches absolute privilege. Thus no action lies for words spoken in Parliament or in the course of judicial, military, or naval proceedings, even though the words were spoken falsely, knowingly, and with express malice. In less important matters the interests of the public do not demand that the speaker should be freed from all responsibility but merely require that he should be protected so far as he is speaking honestly for the common good. In such cases the privilege is said to be qualified only; and the plaintiff will recover damages in spite of the privilege, if he can prove that the words were not used *bona fide* but that the defendant availed himself of the privileged occasion wilfully and knowingly to defame the plaintiff. In the case of absolute privilege, it is the occasion which is privileged, and when once the nature of

the occasion is shown, every communication on that occasion is protected. But in the case of qualified privilege the defendant does not prove privilege until he has shown how that occasion was used. It is not enough to have an interest or duty in making a communication, the interest or duty must be shown to exist in making the communication complained of. Again, qualified privilege is a privilege rebuttable by proof of express malice on the part of the defendant.

Absolute privilege attaches to (1) Parliamentary proceedings, (2) Judicial proceedings, (3) Military or Naval proceedings, and (4) State proceedings.

(1). Speeches in Parliament are absolutely privileged. But this privilege does not extend to anything said outside the walls of the House, or to a speech printed and privately circulated outside the House. A petition to Parliament, or to a committee of either House, and statements of witnesses before Parliamentary select committees are absolutely privileged.

(2). No action lies against a Judge of a *superior* Court for words spoken on the bench, even though it be alleged that he spoke maliciously, knowing his words to be false, and also that his words were irrelevant and wholly unwarranted by evidence (*Anderson v. Gorrie*). A Judge of an *inferior* Court of record enjoys the same immunity in this respect as the Judge of a superior Court so long as he has *jurisdiction* over the matter before him. A Justice of the Peace, a coroner, and a juror, enjoy the same privilege as the Judge of an inferior Court.

No action will lie against an advocate for defamatory words spoken with reference to, and in the course of, any inquiry before a judicial tribunal, although they are uttered by the advocate maliciously, and not with the object of supporting the case of his client, and are uttered without any justification, or even excuse, and from personal ill-will or anger towards the person defamed, and are irrelevant (*Munster v. Lamb*; *Sullivan v. Norton*). An advocate has the fullest liberty of speech in the course of a trial before a judicial tribunal so long as his language is justified by his instructions, or by the evidence, or by the proceedings on the record (*Bhaishankar v. Wadia*).

No action will lie against a party conducting his own case for statements made in open Court, no matter how false or malicious or irrelevant to the matter in issue the words complained of may have been (*Royal Aquarium v. Parkinson*).

A witness in the box is absolutely privileged in answering all the questions asked him by the counsel on either side. For any statements voluntarily made by him he will be protected if they are *relevant* to the matter in issue. But an observation made by a witness before entering or after leaving the box is not privileged.

Affidavits sworn in the course of a judicial proceeding before a Court of *competent jurisdiction*, as well as pleadings are absolutely privileged.

(3). All acts done in the honest exercise of military or naval authority ; reports made in the course of military or naval duty ; and statements, whether false or malicious, made before a military or naval Court Martial are absolutely privileged.

(4). Every communication relating to State matters made by one minister to another, or to the Crown, and all records and documents in which the opinions or orders of public officers relating to other public officers are contained, are absolutely privileged.

Qualified privilege. The plea of qualified privilege attaches to the following cases :—

(1). When circumstances are such as to cast on the defendant the duty of making the communication to a third party (*Pullman v. Hill*). The duty may be legal, social, or moral. For instance a public officer may be under a legal duty to address to another a statement of facts pertinent to a matter which it is his duty to investigate ; and he will be protected if he made the statement honestly in belief of its truth. Communications made in pursuance of a duty owed to society relate to character of servants ; some confidential matters of a private nature ; and information as to crime.

(2). Communications made in self-defence or protection. Here the statements made may be necessary to protect the defendant's private interests ; or they may be statements provoked by the plaintiff by any previous attack on the defendant ; or they may be statements invited by the plaintiff in answer to any application or enquiry from him.

(3). Communications made in protection of common interest. Every communication made *bona fide* upon any subject matter, with the object of protecting an interest common to the writer or speaker, and the person to whom it is made, is privileged (*Hunt v. G. N. Ry.* ; *Harrison v. Bush*). The common interest may be in respect of family affairs, money matters, profession, or any right or duty recognised by law.

(4). Communications made to persons in public position

for public good. Every communication is privileged which is made *bona fide* with a view to obtain redress for some injury received, or to prevent or punish some public abuse.

(5). Fair and impartial reports of proceedings in Parliament; or a Court of Justice, or a public meeting.

WRONGS relating to Domestic Rights relate to the invasion of (1) marital rights; (2) parental rights; Domestic rights, (3) tutelary rights; and (4) rights to the services of servants.

(1). Violation of marital rights can take place in three ways: (i) Abduction, or taking away a man's Marital rights, wife; (ii) adultery, or criminal conversation with her; and (iii) beating or otherwise abusing her.

(i). The Common law gives a husband a right of action against any person who takes away his wife by force or fraud. Similarly he can sue any one who persuades or entices the wife to live separate from him without a sufficient cause.

(ii). For adultery the Common law gave to the husband a writ of trespass *vi et armis* against the adulterer. But this action was abolished by the Divorce and Matrimonial Causes Act (20 & 21 Vic. c. 85), which enables any husband, either in a petition for dissolution of marriage, or for judicial separation, or in a petition limited to such object only, to claim damages from the adulterer.

(iii). If by mal-treatment the husband was deprived for any time of the company and assistance of his wife, the Common law gave him a separate remedy by an action for damages for such maltreatment, *per quod consortium amisit*.

(2). The Common law gave a remedy to parents for the abduction of their children. For injuries to Parental rights, children a remedy to the parent was developed through a fiction of service due from child to parent.

(3). Tutelary right (or a right of a person as a guardian over a child) is violated by any person, with Tutelary rights, notice of the right of the guardian, arrogating to himself the control which is vested in the guardian. The guardian can maintain an action for loss of services against any one who wrongfully interrupts the rendering of them.



(4). Every person who maliciously, or with notice, interrupts the relation subsisting between master and servant—(i) by procuring the servant to depart from the master's service, (ii) by harbouring and keeping him as servant after he has quitted it, and during the time stipulated for as the period of service, whereby the master is injured, commits a wrongful act (*Lumley v. Gye*; *Bowen v. Hall*; *Temperton v. Russell*; *Allen v. Flood*; *Quinn v. Leathem*). A master can also bring an action against a person for beating or confining his servant in such a manner that he is unable to perform his work. As a recompense for his immediate loss the master may maintain such action, but he must allege and prove special damage he has sustained by injuries to his servant (*per quod servitium amisit*). But a master or parent, cannot maintain an action against a wrong-doer for injuries causing the immediate death of his servant, or child capable of performing service (*Osborn v. Gillett*).

In the case of female children, the father or guardian, and in the case of female servants, the employer, has a right of action for seduction. To support this action two things are necessary : (1) Proof of actual service of some kind, however slight, at the date of seduction ; and (2) the child or servant must have been rendered ill and incapable to render service in consequence of the seduction. In the case of parents the action is based upon a bare fiction of service ; and in the case of master upon an actual contract of service. Loss of service must be alleged and proved at the trial, otherwise the plaintiff will fail. In the language of the old writs, he sues *per quod servitium amisit* (for that he has lost service). A girl under twenty-one is presumed to be in the service of her father or guardian whenever she is not actually in the service of another (*Terry v. Hutchinson*; *Dean v. Peel*). Where the girl is not under twenty-one some slight service must be proved, *e. g.*, making tea or milking cows. A *de facto* relation of service is enough ; the plaintiff need not prove a binding contract of service. Where the girl is in the service of one man at the time of seduction, of another at the time of the pregnancy and illness, no action lies (*Davies v. Williams*). It should be noted that a woman cannot herself maintain any action in respect of her own seduction on account of the maxim *volenti non fit injuria*, she being a consenting party. Where an action of seduction lies, a Court will award exemplary damages.

SLANDER of title consists of a false and malicious statement in writing, printing, or by word of mouth, injurious to any person's title to property, and causing special damage to such person.

The plaintiff must prove :—

(1). That the statement is false. It is for the plaintiff to prove it so, not for the defendant to prove it true.

(2). That the statement was made *mala fide* and is malicious. There must be express or implied malice.

(3). That the statement goes to defeat his title to property, which may be either real or personal, and the plaintiff's interest therein may be either in possession or reversion.

(4). That special damage has resulted from the statement made by the defendant (*Malachy v. Soper*). Such special damage must also be the natural and reasonable consequence of the words used.

SLANDER of goods is an untrue statement, disparaging a man's goods, published without lawful occasion, and causing him special damage. To maintain an action for slander of goods three

things should be proved :

(1). That the defendant had disparaged plaintiff's goods ;

(2). That such disparagement was false ; and

(3). That damage had resulted or was likely to result (*White v. Mellin*).

It is not necessary to prove actual malice, it is sufficient if the statement is made without reasonable cause.

MALICIOUS prosecution is the malicious institution against another of unsuccessful criminal, or bankruptcy, or liquidation proceedings, without reasonable or probable cause. In such an action the plaintiff has to prove—

(1). That he was prosecuted by the defendant before a judicial officer. No action will lie for a civil action brought maliciously and without reasonable and probable cause.

(2). That he was innocent and his innocence was pronounced by the tribunal before which the accusation was made. He must show that the proceedings terminated in his favour if they are capable of such termination. He need not prove acquittal, for a prosecution may be determined in various ways.

(3). That there was no reasonable or probable cause for the prosecution. Reasonable cause is such as would operate on the mind of a discreet man ; probable cause is such as would operate on the mind of a reasonable man. The case of *Abrath v. North Eastern Ry.* lays down that a defendant will be

deemed to have had reasonable and probable cause when (a) he took care to be informed of the facts, (b) he honestly believed his allegations to be true; and (c) the facts were such as to constitute a *prima facie* case. The existence of reasonable and probable cause does not avail if the prosecutor prosecuted in ignorance of it. The dismissal or abandonment of a prosecution does not create any presumption of the absence of reasonable and probable cause; nor does an acquittal for want of evidence.

(4). That the proceedings were initiated in a malicious spirit, that is, from an indirect improper motive, and not in furtherance of justice: It will be sufficient that the party was actuated either by spite or ill-will towards an individual (*Hicks v. Faulkner*). From a want of reasonable and probable cause a Court may infer malice, but not *e contra*.

(5). That he has suffered in person, reputation, or pocket by the prosecution. It is necessary to show some damage resulting to the plaintiff from the prosecution. It need not be pecuniary. But it must be the reasonable and probable result of the malicious prosecution.

Malicious prosecution is distinguished in two ways from false imprisonment (see p. 271). In the former, the plaintiff must prove the non-existence of reasonable and probable cause, while in the latter, the onus lies on the defendant of proving its existence, as his justification (*Hicks v. Faulkner*). Again, a person may become liable to an action for false imprisonment by setting a ministerial officer in motion, but by setting a judicial officer in motion he may render himself liable to an action for malicious prosecution.

Malicious arrest is wilfully putting the law in motion to effect the arrest of another under civil process without reasonable and probable cause. It is not actionable unless it involves interference with liberty. The plaintiff must show—

(1). That the original action out of which the injury arose was decided in his favour.

(2). That the arrest was procured maliciously and without reasonable and probable cause.

(3). That the damage or injury sustained was something other than an injury which has been, or might have been, compensated for by an award of the costs of suit; that is, the plaintiff must show that he has suffered some collateral wrong.

If a person sets the process of a Court in motion and a wrong person is arrested, he is only responsible if he obtained such process fraudulently and improperly. If he truly states the facts and the Judge thereupon does an erroneous act, he is not liable.

Maintenance is an officious intermeddling in a suit which in no way belongs to one by maintaining or assisting either party with money or otherwise to prosecute or defend it. Where a person agrees to maintain a suit in which he has no interest, the proceeding is known as *maintenance*, where he bargains for a share of the result to be ultimately decreed in a suit in consideration of assisting in its maintenance it is styled *champerty*. Both these tend to encourage litigation which is not *bona fide* but speculative. The law of maintenance is confined to cases where a man improperly, and for the purpose of stirring up litigation and strife, encourages others to bring actions, or to make defences, which they have no right to make. Malice is said to be of the essence of the action, but the law will imply malice upon proof of officious assistance (*Bradlaugh v. Newdegate*). But the maintainer can justify himself by shewing (1) that he had a common interest in the action with the party maintained, and (2) that he was actuated by motives of charity, *bona fide* believing that the person maintained was a poor man oppressed by a rich one.

A conspiracy is an unlawful combination of two or more persons to do that which is contrary to law, or to do that which is wrongful and harmful towards another person, or to carry out an object not in itself unlawful by unlawful means (*Quinn v. Leatham*). The mere act of conspiracy is not the subject of a civil action. There must be some act in pursuance of the conspiracy, and there must be actual damage to the plaintiff. It is the damage wrongfully done, and not the conspiracy, that is the gist of action (*Gregory v. Brunswick*, the hissing case). No action for a conspiracy lies against persons who act in concert to damage another and do damage him, but who at the same time merely exercise their own rights by lawful means and who infringe no rights of other people; *e. g.*, acts done for the purpose of protecting and extending trade (*Mogul Steamship Co. v. McGregor*, rebates on freights to shippers who dealt solely with the Co.). But a combination not in pursuit of trade interests, but in pursuit merely of a malicious purpose to injure another, would be clearly unlawful, and, if an injury has resulted, an action would lie (*Quinn v. Leatham*).

### *Torts to Property.*

TRESPASS to land (trespass *quare clausum fregit*) is the wrongful and unwarrantable entry upon the soil or land of another person. To constitute this wrong neither force, nor unlawful

Trespass.

intention, nor actual damage, nor the breaking of an enclosure is necessary. Every invasion of private property, be it ever so minute, is a trespass. The question of trespass or no trespass, not the amount of the alleged trespass, is alone material. The plaintiff must establish—(1) exclusive possession of himself or of his servant, or agent; and (2) entry, actual or constructive. Trespass to land is founded upon possession, not upon title. An apprehended trespass furnishes no ground of action. Trespass by a man's cattle is dealt with similarly to trespass committed by himself. In respect of a continuous obstruction on land, a fresh action of trespass may be brought *de die in diem*, and recovery in a former action is no defence. Joint-tenants or tenants-in-common can only sue one another in trespass for acts done by one inconsistent with the rights of the other, *e. g.*, destruction of buildings, carrying away of soil.

The person whose land is trespassed upon may (1) bring an action for trespass against the wrong-doer, or (2) forcibly defend his possession against a trespasser, or (3) forcibly eject him.

But a defendant can plead any of the following defences to an action for trespass:—(1) Prescription; (2) leave and license; (3) authority of law in execution of legal process, or for levying distress or distress damage feasant; (4) acts of necessity; (5) self-defence; (6) re-entry on land; (7) retaking of goods or cattle; (8) abating a nuisance; (9) special property or easement; and (10) *Liberum tenementum* (*i. e.*, at the time of the trespass the land was the freehold of the defendant).

Dispossession or ouster is wrongfully taking possession of land from its rightful owner. The word  
 Dispossession. dispossession applies only to cases where the owner of land has, by the act of some person, been deprived altogether of his dominion over the land itself, or the receipt of its profits. A person cannot be dispossessed of immoveable property unless he was possessed thereof at the time.

The party dispossessed can bring an action of ejectment to recover possession of the land. But to an action of ejectment *jus tertii* is a good defence. However, there are two exceptions to this: (1) the landlord need not prove his title but only the termination of the tenancy; (2) licensees cannot dispute the title of the persons who licensed them.

When authority, or license, is given to any one by law to enter upon lands or tenements of any person  
 Trespass *ab initio*. and he abuses it, he becomes a trespasser *ab initio*, *i. e.*, the authority or justification is

not only determined, but treated as if it had never existed, and he is in the position of a perfect stranger acting without excuse or justification. His misconduct relates back so as to render his original entry tortious. But where authority is not given by law, but by a party, and abused, then the person abusing such authority is not a trespasser *ab initio*. The abuse necessary to render a person trespasser *ab initio* must be a misfeasance and not a non-feasance (*Six Carpenters' case*, refusing to pay for wine drunk in a tavern). This doctrine has been applied in modern times to the lord of a manor taking an estray, and to a sheriff remaining in a house in possession of goods taken in execution for an unreasonably long time.

Whenever any wrongful act is necessarily injurious to the reversion to land, or has actually been injurious to the reversionary interest, the reversioner may sue the wrong-doer. The owner of a life estate or interest is not allowed to destroy, consume, or otherwise permanently impair the *corpus* or substance of the subject thing, so as thereby to leave it to the remainderman or the reversioner in a worse state than it would otherwise have been left. A plaintiff suing as reversioner must show (1) that by the acts complained of, his reversionary estate and interest were depreciated or lessened in value; and (2) that the injury complained of was of so durable a kind as necessarily to produce damage to his estate.

Waste is a spoil or destruction of houses, gardens, trees, or other corporeal hereditaments, to the dispersion of him that hath the remainder or reversion. The injury to the inheritance must be either (1) by materially diminishing the value of the estate; or (2) by increasing the burden; or (3) by impairing the evidence of title. Waste is either (1) voluntary, which is an offence of commission, as by pulling down a house; or (2) permissive, which is an offence of omission only, as by allowing it to fall for want of repairs. Action for waste must generally be brought by the person next entitled in remainder; and, if the latter has only a life estate, he is only entitled to such damages as are commensurate with the injury done to his life estate. Tenants for life, for years, at will, and at sufferance, are liable for waste. But in the absence of an express covenant, neither a tenant for life, nor a tenant at will, is liable for permissive waste. A tenant in fee simple is not liable for waste, nor is a tenant in tail, because he can at any time bar the entail, and make himself tenant in fee simple; but a tenant in tail, after possibility of issue extinct, is liable for equitable waste, inasmuch as he cannot bar the entail.

The most important Natural Rights and easements relating to property, the invasion of which are treated as wrongs, are : (1) right to support ; (2) rights to water ; (3) rights to free access of light and air ; (4) right of way ; and (5) right of privacy.

(1). Right to support may be (i) of land by land, (ii) of buildings by land, (iii) of buildings by buildings, and (iv) of land and building by water.

(i). Support of land may be either the lateral support of land by adjacent land ; or the vertical support of the surface by sub-soil, where the property in the two is distinct. Every proprietor of land is entitled of common right to such an amount of *lateral support* from the adjoining land of his neighbour as is necessary to sustain his own land in its *natural state*, not being weighted by walls or buildings (*Humphries v. Brogden*). This right is not absolute right ; and the infringement of it is not actionable without appreciable damage (*Smith v. Thackerah*). If a person has erected a house upon his land, he cannot independently of any acquired right by grant or prescription, insist upon its being supported by the adjoining land of the defendant. But the natural right of support for the soil remains notwithstanding the erection of the buildings. As regards the right of *vertical support*, the owner of the surface is entitled of common right to the support of the subjacent strata so that the owner of the sub-soil and minerals cannot lawfully remove them without leaving support sufficient to maintain the surface in its *natural state* (*Humphries v. Brogden*). But the owner of the sub-soil is not bound to support any buildings, unless the owner of the surface has acquired the right of support for them by grant or prescription. Where the owner of the land grants the sub-soil he impliedly grants reasonable means of access to it. The owner of the surface cannot dig holes into the sub-soil to a greater extent than is reasonably necessary for the proper and fair use, *e. g.*, cultivation. No right of action lies until some actual damage has been sustained by the owner of the surface (*Backhouse v. Bonomi*).

(ii). Support of buildings by land may be either by adjacent soil, or by subjacent soil. The natural right to support exists in respect of land only, and not in respect of buildings. A right to support for buildings may be acquired as an easement (1) by grant, express or implied ; or (2) by prescription (*Angus v. Dalton*).

(iii). As regards the right of support of buildings by buildings, it may be observed that where two houses, erected by different owners, stand in juxtaposition, they in fact stand each

on its own ground, and there is no right of support for the one by the other, and it will not necessarily be presumed to have been acquired however ancient the houses. It may exist by express grant ; or by prescription (*Lemaitre v. Davis*). But the mere fact of contiguity of buildings imposes an obligation on the owners to use due care and skill in removing one building not to damage the other. If one man builds two or more houses, each needs the support of the other, and then if he sells one, it is presumed that he reserves for himself and grants to the buyer the right of mutual support. If he sells several such houses to several persons at different times, each has the same right of support. Damage is necessary to give rise to a right of action.

(iv). An owner of land has no right at common law to the support of subterranean water. The right of vertical support does not extend to have the support of any underground water which may be in the soil so as to prevent the adjoining owner from draining his soil (*Popplewell v. Hodgkinson*). But if there is wet sand, or running silt, or natural pitch, instead of water, an action will lie if any subsidence is caused by their removal.

(2). Rights to water relate (a) to surface water and (b) to subterranean water. Surface water may be

Rights to water. (i) water of natural streams, (ii) water standing on the soil, and (iii) water of artificial watercourses. Subterranean water may be (i) water of subterranean streams the courses of which are well-known and clearly defined, (ii) water of subterranean streams the courses of which are undefined, and (iii) water which is percolating and the course of which is underground, undefined, and unknown.

(i). A natural stream is one which arises at its source from natural causes, and flows in a natural channel.

Surface water. Every landowner has a natural right to the uninterrupted flow, without diminution, deterioration in quality, or alteration, of the water of natural surface streams which pass to his lands in defined channels, and to transmit the water to the land of other persons in its accustomed course. Riparian owners are entitled to use and consume the water of the stream for drinking and household purposes, for watering their cattle, for irrigating their land, and for purposes of manufacture ; subject to the conditions that (1) the use is reasonable, (2) it is required for their purposes as owners of the land, and (3) it does not destroy or render useless, or materially diminish, or affect the application of the water by riparian owners below the stream in the exercise either of natural right or their right of easement if any. A right to pollute a natural stream may be acquired by grant or prescription. If the rights



of a riparian proprietor are interfered with he may maintain an action eventhough he has suffered no actual loss.

(ii). The right to surface water standing on the soil, or not running in a defined channel, is in the owner of the soil.

(iii). An artificial stream is one that arises by the agency of man, or though arising from natural causes, flows in a channel made by man. The law governing artificial water-courses depends upon whether they are of a *permanent* or *temporary* character, and upon the circumstances under which they were created. If an artificial stream is *permanent* in its character, a right to an uninterrupted flow of water may be acquired by prescription or grant against both the originator of the stream, and also against any person over whose land the water flows. Long enjoyment of an artificial stream will not, however, give a right to the unobstructed use of a stream made for *temporary* purposes.

(i). The law as to subterranean stream, the Subterranean water. course of which is well-known and clearly defined, is similar to that of natural streams flowing above ground.

(ii) & (iii). The principles applying to subterranean stream the course of which is undefined, and of percolating water in an unknown course are the same. There is no natural right to the uninterrupted flow of such streams. Such a right can neither be acquired by prescription, though it may be acquired by express grant. The right of owner of land to divert or appropriate the percolating water within his own land is the same whether his motive be to improve his land or to maliciously injure his neighbour (*Corporation of Bradford v. Pickles*). But (1) he is not entitled to pollute water flowing also beneath another's land; and (2) he will be restrained from drawing off underground water from his neighbour's land, if, in doing so, he abstracts water which has once flowed in a defined surface channel.

(3). Every owner of land has a natural and common law right that the air which passes over his land shall not be polluted by other persons, and any person who pollutes it is guilty of a wrongful act. The right to the purity of air is not violated unless the annoyance is such as materially to interfere with the ordinary comfort of human existence.

Access and use of air to and for any building may be acquired by grant, express or implied; by covenant; by devise; by custom; and by prescription. Where such a right to uninterrupted air is acquired, any infringement of it will give rise to an action.

In considering whether there has been an invasion of light, the question is this, Is there a diminution of light for any purpose for which the dominant tenement may be reasonably considered available? There must be a substantial privation of light, sufficient to render the occupation of the house uncomfortable, and to prevent a person from carrying on his accustomed business as beneficially as he had done prior to obstruction. In considering whether a house has been substantially injured, it is proper to have regard to the ordinary uses by way of habitation or business to which the house has been put, or might reasonably be supposed to be capable of being put. The right to light is an absolute indefeasible right *without reference to the purpose* for which it has been used. No person will be allowed to interrupt it, unless he can show that, for *whatever purpose* the plaintiff might wish to employ the light, there would be no material interference with it by the alleged obstruction (*Yates v. Jack*). Thus it is no defence to urge that no material injury will be done to the plaintiff, and there would be ample light remaining for the business carried on by him.

(4). A person commits a wrong who disturbs the enjoyment of a right of way by blocking it up permanently or temporarily, or by otherwise preventing the free use of it. But a private person cannot bring an action for obstruction to a public way without showing any particular or special inconvenience or injury to himself beyond that suffered by any member of the public. Such special damage must differ not merely in degree but in kind from that sustained by the rest of the public.

(5). Invasion of privacy by opening a window is not an act of which the English law will take cognizance as a wrongful act. But under the Indian Easements Act such right might be acquired in virtue of a local custom. It has been recognised in Gujerat, North-West Provinces, and Punjab; though not in Calcutta and Madras presidencies.

TRESPASS to goods (or trespass *de bonis asportatis*) is a wrongful meddling by a person, or of an animal belonging to him, with the goods of another. The plaintiff must show (1) That he was in possession, actual or constructive, of the goods. There is a constructive possession of goods in all cases where there is a legal right to possess. (2) That his possession has been wrongfully disturbed. The fact that the trespass was unintentional is no ground of defence. A trespass to chattels

may be committed by animals belonging to the defendant. Formerly, the remedy for trespass to goods was either by an action of trespass for damages for any direct injury done, or by an action of trespass on the case for any injury not direct, but consequential. But this distinction is done away with by the Judicature Act. A joint-owner can maintain an action of trespass against his co-owner if the latter has done some act inconsistent with the joint ownership : except (1) when the chattels have been completely destroyed, and (2) when there has been a sale of the chattels in market overt.

The defences to an action of trespass are :—(1) Self defence, or defence of property. (2) Exercise of one's absolute or relative rights. (3) Obedience to some legal or personal authority. (4) Negligent or wrongful act of the plaintiff himself. (5) Recapture of goods. (6) The defence of *jus tertii* can be set up against a plaintiff who has himself neither an actual nor a constructive possession of the chattels.

Conversion is the wrongful taking, or using, or destroying of the goods of another, or an exercise of dominion over them inconsistent with the title of the owner. An act of conversion may

be committed—

(1). When the property is wrongfully taken. The taking need not be with the intention of acquiring a full ownership. It is enough if any interest is claimed inconsistent with the right of the person entitled. The taking may be constructive merely, but a taking unaccompanied by an intention to exercise permanent or temporary dominion is not conversion. Actually dealing with another's goods as owner, for however short a time, under a mistaken supposition of being lawfully entitled, or even with the intention of benefitting the true owner, would amount to conversion.

(2). When the property is wrongfully parted with. It is a conversion if a man hands over goods to another so as to give him some right over the property itself, whether as owner or *dominus pro tempore*. Mis-delivery by a carrier will amount to conversion.

(3). When the property is wrongfully sold in market overt although not delivered. In *market overt* the property is passed to the purchaser by the sale, which is therefore equivalent to physical destruction.

(4). When the property is wrongfully retained. The plaintiff must prove that the defendant having it in his possession refused to give it up on demand made by him (*Armory v. Delamirie*, the jewel case). The demand as well as the refusal should

be unconditional in their terms. A demand and refusal do not in themselves constitute the conversion. They are evidence of a conversion at some previous period.

(5). When the property is wrongfully destroyed. Every wilful and wrongful destruction of a chattel, or wilful and wrongful damage to it, whereby the owner is deprived of the use of it in its original state is a conversion of it.

In all the above five cases the defendant's ignorance of the unauthorised character of his act cannot always be relied upon as a defence. But to maintain an action for conversion the plaintiff should have a right of property in the thing converted, and also a right of possession. Formerly, this action was known as an action of trover, which was founded on the fiction that the defendant had found the goods in question; and the plaintiff claimed not the return of the goods but their value.

The defendant can plead any of the following defences:—(1) Lien, either general or particular. (2) Right of stoppage in transit. (3) Denial of plaintiff's right of property. (4) Denial of possession. (5) Denial of some qualified right in the chattels.

Detention is the adverse withholding of the goods of another. The remedy is an action of *detinue*.

Detention. This action lies for the specific recovery of chattels, wrongfully detained by the party sued, or by his servants or agents, from the person entitled to the possession of them, and also for the damages occasioned by the wrongful detainer. It is immaterial whether the goods were obtained by defendant by lawful means, as by a bailment or finding, or by a wrongful act, as a trespass or conversion. The injury complained of is not the taking, nor the misuse and appropriation of goods, but only the detention. The plaintiff must show a special and general property in the goods, and a right to the immediate possession of them. There should be evidence of a request on the part of the plaintiff to have the goods delivered to him, and of a refusal to deliver on the part of the defendant. But the defendant can plead successfully his lien on the goods. Detinue does not substantially differ from conversion by detention.

A PATENT right is a privilege granted by the Crown to the first inventor of any new manufacture or invention, that he and his licensees shall have the sole right, during the term of fourteen

years, of making and vending such manufacture or invention. The patentee must be the true and first inventor. The subject-

matter of a patent must (1) be some new manufacture, (2) be novel, (3) have a quality of utility to the public, and (4) have an amount of ingenuity. A patent privilege may be infringed—(1). By making articles for use or sale by means of the art which has been invented by the patentee; or by using, exercising, or putting the art in practice, to the prejudice of the patentee in any other way.

(2). By selling articles made in violation of the patent privilege.

(3). By making for use or sale, or vending articles which counterfeit, imitate, or resemble, articles made in pursuance of the invention.

(4). By counterfeiting or imitating the invention in any other way.

Where a patent right is infringed, the patentee may claim either (1) an account of profits made by the wrong-doer, or (2) damages for loss caused by the wrong-doer by selling goods similar to his own. It is no valid defence to urge that the defendant did not know of the grant of the patent, or that he had no intention of infringing it.

A copyright is the sole and exclusive right of printing or otherwise multiplying copies of any book.

Copyright. This right exists in (1) books, (2) letters, (3) lectures, (4) dramatic productions, (5) musical compositions, and (6) unpublished works of art.

(1). For a book to be capable of protection as copyright it is necessary that it must be (i) innocent, *i. e.*, it must not be seditious, or libellous, or immoral, or blasphemous, or fraudulent; (ii) of literary value; and (iii) original.

This right is infringed in the following cases:—(i) where a publisher publishes an unauthorized edition of a work in which copyright exists.

(ii). Where a man introduces to sell a foreign reprint of a work in which copyright exists.

(iii). Where a man pretending to be the author of a book illegitimately appropriates the fruits of a previous author's labour.

(iv). Where a man sells a work under the name and title of another man or another man's work.

(2). In the case of letters, the writer retains a copyright in them, so as to hinder the receiver from publishing them.

(3). In the case of lectures, delivered to a selected number or limited class or persons, the lecturer has a right to prevent publication of them by others. But there is no such right when they are addressed to the public at large.

(4) & (5). Dramatic and musical copyright is governed by several statutes in England.

(6). As regards works of *art*, it has been decided that the owner of a picture, engraving, drawing, &c., has a right before publication to prevent any copy being made of it (*Prince Albert v. Strange*).

A mark used for denoting that goods are the manufacture or merchandise of a particular person is called a trade-mark. The use of a mark so similar as to *lead*, or be *likely to lead*, purchasers to buy the goods marked therewith under the impression that they are the goods of the original manufacturer whose mark they bear, is an infringement of that mark. It is only when the use of the name *deceives* or is reasonably *likely to deceive* the public that it can be interfered with or prevented. It is not enough to show a *mere possibility* of deception. There must be a *reasonable probability* of purchasers being deceived. The test is the impression likely to be produced on the casual and unwary customers (*Singer's case*). Actual physical resemblance of the two marks is not necessary. It is enough if one of the designs is an obvious imitation of the other. For the purposes of a civil remedy, the invasion is none the less, though the false trade-mark is used unwittingly or innocently.

A tradename may be either the name of the manufacturer of goods or some name by which the manufactured goods have become generally known. The wrong consists in any other person selling goods of his own in such a way as to lead the public to suppose that they are purchasing some one else's goods. The principle is that nobody has any right to represent his goods as the goods of somebody else (*Reddaway v. Benham*). But where a tradename is merely descriptive of the article, whether originally a descriptive name or not, and does not designate manufacture by any particular firm, it cannot any longer be exclusively retained by the original maker, but may be adopted by any other trader.

### *Wrongs to Person & Property.*

FRAUD consists in leading a man into damage by wilfully or recklessly causing him to believe and act on a falsehood. In order to sustain an action of deceit, *first*, there must be proof of fraud, and nothing short of that will suffice.

*Secondly*, fraud is proved when it is shown that a false representation has been made (i) knowingly, or (ii) without belief in its truth, or (iii) recklessly, careless whether it be true or false. A representation in order to be fraudulent must be—

(1). A representation which is untrue in fact. There must be an active attempt to deceive by a statement which is false in fact and fraudulent in intent. The representation need not be by words, it may be by acts (*Pickering v. Dawson*, case of papering a defect in wall). Again, it must be a representation of fact, and must not be a mere expression of opinion. A suppression of the truth may in some cases amount to a suggestion of falsehood.

(2). A representation which defendant knows to be untrue or is indifferent, or careless, as to its truth. Unless this is so, a representation which is false gives no right of action to the party injured by it (*Dickson v. Reuter's Telegraph Co.*, the barley case). No action lies upon a representation which the maker honestly believed to be true, however unreasonable the grounds of his belief (*Derry v. Peek*, steam tramway prospectus case; *Chandelor v. Lopus*, bezour stone case). On the other hand, honesty of motive never atones for knowledge of falsity (*Polhill v. Walter*, the bill of exchange case). But a negligent misrepresentation does not amount to deceit (*Low v. Bouviere*; *Angus v. Clifford*).

(3). A representation which was intended or calculated to induce the plaintiff to act upon it. Intention to induce a course of conduct is always necessary. Whether the representation is made to the plaintiff, or to a third party, is immaterial, if it is false to the knowledge of the defendant, and has been made for the purpose of being communicated to the plaintiff (*Langridge v. Levy*, the gun case; *Longmeid v. Holliday*, the lamp case) or to a class of persons of whom the plaintiff is one (*Denton v. G. N. Ry.*, the time-table case). The misrepresentation should have been made in relation to the transaction in question (*Peek v. Gurney*, the prospectus case).

(4). A representation which the plaintiff acts upon and suffers damage. The plaintiff must show that he was deceived by the fraudulent statement and acted upon it to his prejudice. Fraud without damage, or damage without fraud, gives no cause of action; but where these two concur an action lies (*Paseley v. Freeman*, the cochineal case; *Horsfall v. Thomas*, the cannon case).

*Thirdly*, if fraud be proved, the motive of the person guilty of it is immaterial. It matters not that there was no intention to cheat or injure the person to whom the statement was made (*Derry v. Peek*).

The defendant will be held responsible for so much of the damage or loss as was the necessary, natural, or probable known consequences of the misrepresentation.

For the liability of a principal for the misrepresentation made by his agent see the table on page 431.

NUISANCE is anything done to the hurt or annoyance of the lands, tenements, or hereditaments of another, and not amounting to a trespass. It is the wrong done to a man by unlawfully disturbing him in the enjoyment of his property, or in the exercise of a common right. Nuisances are of two kinds : (1) public, and (2) private.

(1). Public nuisance is an act or omission, which causes any common injury, danger, or annoyance to the public or to the people in general who dwell or occupy property in the vicinity, or which must necessarily cause injury, obstruction, danger, or annoyance to persons who may have occasion to use any public right. Public nuisance, which is an offence against the public order and economical regimen of the State, affects all equally, and can only be the subject of one indictment, otherwise a party might be ruined by a million suits. No length of time can legalize it, as it cannot have a lawful beginning. In order that an individual may have a private right of action in respect of a public nuisance—(i) he must show a particular injury to himself beyond that which is suffered by the rest of the public, (ii) such injury must be direct and not a mere consequential injury, and (iii) it must be shown to be of a substantial character, not fleeting or evanescent (*Benjamin v. Storr*).

(2). Private nuisance is no offence against the public, but only against some particular individual or individuals as distinguished from the public at large. It cannot be made the subject of an indictment, but may be the ground of civil action for damages, or an injunction, or both. A right to commit a private nuisance may be acquired by prescription as an easement. The degree of harm in an action brought for a nuisance on the ground that the thing alleged to be a nuisance is productive of *personal discomfort* must be greater than in action brought on the ground that it produces *injury to property*. In the case of physical discomfort, the act complained of must (i) having special regard to the circumstances and surroundings of the defendant's property, be in excess of the natural and ordinary course of enjoyment of that property; and (ii) materially interfere with the ordinary comfort of human existence (*Walter v.*



*Selfe*, case of burning bricks). Nuisances of this class for the most part arise in respect of (1) obstruction to light, (2) pollution of air or water, and (3) noise. In the case of injury to property, any sensible injury would be sufficient to support an action (*Tipping v. St. Helen's Smelting Co.*, injury to tree case). Nuisances of this class arise from manufacturing works, sewers, drains, &c. A person is not debarred from suing for a nuisance because it existed before he came to its neighbourhood.

If the injured property is in the occupation of tenants, the landlord or reversioner has no right of action, unless the nuisance is of a *permanent* character, and necessarily inflicts a *lasting* damage to the inheritance. So long as the tenants stop and endure the nuisance they are the only persons who can complain.

Who may sue. He who actually creates a nuisance is liable for it. Where a nuisance is caused by the physical condition of premises resulting from an act of *commission*, the party who *originally* created the nuisance remains liable. Where the physical condition of premises complained of is the result of a wrong of *omission*, the owner cannot get rid himself of the liability for the possible consequences of his breach of duty by merely letting the premises to tenants without taking a covenant from them to repair the premises. If he lets them without such a covenant, both landlord and tenant are liable. Where the nuisance arises from the mode of using the premises, then, if the premises are in the occupation of a tenant, he alone will be liable.

Who is liable. The remedies for nuisance are: (1) abatement, (2) damages, and (3) injunction. Abatement means removal of the nuisance by the party injured. The removal must be peaceable; without danger to life or limb; and, if it is necessary to enter another's land or property, after notice to remove the same. Nuisances by an act of commission may be abated without notice to the person who committed them, but not nuisances from omission (except that of cutting the branches of a tree overhanging a person's property). But if a speedy remedy is required and it is unsafe to wait, nuisances by omission could be abated without notice. A private individual cannot abate a public nuisance, unless it causes him some special and peculiar harm.

The measure of damages is the diminution in the saleable value of the property in consequence of the nuisance.

In order to obtain an injunction it must be shown that the injury complained of as present or impending is such as by reason of its gravity, or its permanent character, or both, cannot be adequately compensated in damages. The injury must be either irreparable or continuous.

NEGLIGENCE is the breach of a duty caused by the omission to do something which a reasonable man, guided upon those considerations which

Negligence.

ordinarily regulate the conduct of human affairs, would do, or by doing something which a prudent and reasonable man would not do, whereby damage has resulted to a person (*Blyth v. Birmingham Water Works Co.*). An action for negligence proceeds upon the idea of an obligation or duty on the part of the defendant to use care, and a breach of it to the plaintiff's injury. It is not necessary that the duty neglected should have arisen out of a contract between the plaintiff and defendants. However the duty may arise, whether by a statute or otherwise, if it exists and is neglected to the injury of the plaintiff, he has a right to sue for damages. There cannot be a liability for negligence unless there is a breach of some duty. Mere omission to exercise active interference on behalf of another to prevent harm, however open to moral censure, is not a civil wrong. There is no absolute or intrinsic negligence; it is always relative to some circumstances, of time, place, or person. Again negligence, to render a person liable, must be the *causa causans* or the proximate cause of the injury and not merely *causa sine qua non*. Negligence in law is, therefore, (1) a breach of duty (2) unintentional and (3) proximately producing (4) injury to another (5) possessing equal rights.

Contributory negligence is negligence in not avoiding the consequences arising from the negligence of some other person, when means and opportunity are afforded to do so. It is the

Contributory negligence.

non-exercise by the plaintiff of such ordinary care, diligence, and skill as would have avoided the consequences of the defendant's negligence. This doctrine is founded upon the maxim *in jure non remota causa sed proxima spectatur*; and contributory negligence is that sort of negligence on the part of a plaintiff which is the proximate and not the remote cause of the injury. The law takes into consideration any act or conduct of the party injured or wronged which may have immediately contributed to that result. Where such conduct can be proved, the party will be considered in law to be the author of his own wrong, and it will be fatal to any action on his part based on the injury. This doctrine seems to be founded upon and to proceed from the maxim *volenti non fit injuria*. Its principles may be summarised as follows:—

(1). Wherever the *immediate*, *proximate* or *decisive*, cause of the damage is the plaintiff's own supineness, carelessness, or unskilfulness, he has no ground of action against the defendant, though the primary and original cause of damage be the

defendant's wrongful act (*Davies v. Mann*, the donkey case; *Butterfield v. Forrester*, the pole case; *Tuff v. Warman*, the barge case).

(2). The plaintiff is not disentitled to recover, unless the defendant proves either (i) that the plaintiff might have avoided the consequences of the defendant's negligence by the exercise of ordinary care, (ii) that the defendant could not have avoided the consequences of the plaintiff's negligence by the exercise of ordinary care (*Radley v. L. & N. W. Ry.*, the loaded truck case). The question will be, which of the parties had it last in his power to avert the disaster?

(3). Where the immediate cause of the accident is the defendant's fault, so that without it the accident could not have happened at all, it is no answer that, only for the plaintiff's negligence in something *collateral* to the immediate cause of the injury, it or part of it might have been avoided.

The doctrine of contributory negligence is unknown to the Maritime law administered in the Courts of Admiralty jurisdiction; and is also not inflexibly applied in cases where young children are concerned (*Lynch v. Nurdin*, the unattended cart case).

Upon the issue of contributory negligence the burden of proof is upon the defendant.

This doctrine was that where a person voluntarily engaged another person to carry him, he so identified himself with the carrier as to be precluded

Doctrine of identification.

from suing a third party for negligence in cases where the carrier was guilty of contributory negligence (*Thoroughgood v. Bryan*). But this doctrine has been expressly overruled in the case of *The Bernina*, in which it is laid down that where damage is sustained by the concurrent negligence of two or more persons there is a right of action against all or any of them at plaintiff's option, and the exception of contributory negligence extends only to the acts and defaults of the plaintiff himself, or of those who are really his agents.

Negligence is divided into *culpa lata* (gross negligence),

Division of Negligence.

*culpa levis* (ordinary negligence), and *culpa levissima* (slight negligence). And accordingly we have the threefold division of neglect of duties requiring (a) less than ordinary care, (b) ordinary care and (c) extraordinary care or skill. In the first division fall those duties performed solely for the benefit of another, namely, those of gratuitous depositaries, gratuitous loan (in the case of the bailor) gratuitously dedicating a way to the public, and gratuitous service. In the second division come those duties which devolve upon persons who do not hold themselves out

as having, nor is there demanded of them, any peculiar or extraordinary care or skill, *e. g.*, neglect of duties by servants or masters. In the third division fall those duties in the performance of which the law demands more than ordinary care. These are :—1. Where a person is acting for his own benefit. 2. Where he professes to have greater skill. 3. Where a higher degree of duty has been undertaken. 4. Where a greater amount of care is deemed necessary for the public benefit.

1. Wherever a person does something for his own advantage, he must take more than ordinary care to avoid injuring the rights of another. The strict principle of law is—*sic utere tuo ut alienum non lædas* (every one must so use his own as not to do damage to another). When this maxim is applied to landed property, it is necessary for the plaintiff to show not only that he has sustained damage, but that the defendant has caused it by *going beyond* what is necessary in order to enable him to have the *natural* use of his own land. The owner or occupier of land may lawfully use it for any purpose for which it might in the ordinary course of the enjoyment of land be used. And for the *natural* user of land an owner will not, in the absence of negligence, be liable though damage results to his neighbour (*Chesmore v. Richards*). But for any *non-natural* user such as the introduction on to the land of something which in the natural condition of the land is not upon it, he is liable if damage results to his neighbour. *Fletcher v. Rylands* (the reservoir case) fully establishes that the person who, for his own purposes, brings on his land and collects and keeps there anything likely to do mischief if it escapes, must keep it in at his peril, and, if he does not do so, he is *prima facie* answerable for all the damage which is the natural consequence of its escape. This is the established law whether the things so brought be beasts, or water, or electricity, or filth, or stench.

But there are several exceptions to the above principle—

(1). *Vis major* (act of God), *i. e.*, such an accident as human foresight could not reasonably be expected to anticipate and prevent (*Nichols v. Marsland*, unusual rain case ; *Blythe v. Birmingham Water Co.*, severe frost case).

(2). Wrongful act of third party (*Box v. Jubb*, case of third party sending a great quantity of water in the defendant's reservoir).

(3). Plaintiff's own fault.

(4). Artificial work maintained for the common benefit of plaintiff and defendant (*Carstairs v. Taylor*, rain-water box case).

(5). When it is the consequence of an act done for public purposes in the discharge of a public duty under the express authority of a Statute (*Madras Ry. Co. v. Zemindar of Carvetinagram*).

The duty in regard to the care of owners or occupiers of houses, land, or structures, differs according as the persons in regard to whom it has to be exercised.

*First*, in the case of trespassers who enter on the property, *without* consciousness of wrong-doing, as  
 Trespassers. where the boundary is ill-defined, the care required is to secure persons so straying upon the premises from damage arising from the condition of the premises, or from anything done upon them in the immediate vicinity of the road or place from which they have strayed (*Barnes v. Ward*, unfenced unfinished house). In the case of trespassers *with* a consciousness of wrong-doing and negligent trespassers, the care required is to avoid endangering the safety of such persons by concealed dangers in the nature of trap, or such as would be likely to punish intruders in a cruel manner (*Bird v. Holbrook* and *Ilott v. Wilkes*, spring-gun cases).

*Secondly*, in the case of licensees and guests, the care required is—(1) To caution them against any  
 Licensees. known insecurity or hidden danger which is of a not readily discoverable character. (2) Not to alter the character of the property (i) by placing on it dangerous obstructions (*Corby v. Hill*, slate case); or (ii) by affecting the condition of the property whereby the danger is increased without notice. (3) Not to be guilty of negligence in any work that is being carried on upon the premises, and by default in which injury might arise to the licensee. The licensee or guest must take care of himself and no action will lie unless the accident by which he sustained the injury has been caused by the gross negligence of the owner (*Southcote v. Stanley*, the pane of glass case). Their position is better than that of a trespasser in that they are entitled not to have the condition of the way so altered as to set up a trap for them.

*Thirdly*, in regard to persons induced to come on the  
 Invited persons. business of the occupants alone or of themselves and the occupants, the occupants must use reasonable care to prevent harm from unusual danger which he knows, or ought to know; and an action will lie for any injury caused by the unsafe state of the premises (*Indermaur v. Dames*, unfenced shaft case; *Heaven v. Pender*, the defective staging case; *Smith v. London & St. Katharine's Dock Co.*, gangway case). This rule will apply to all shop-keepers who, by exposing their goods for sale, tacitly invite the public to enter their premises with a view of transacting business.

*Fourthly*, in regard to persons lawfully passing by the

premises, the care required is to secure them from damage arising from the condition of the premises (*Tarry v. Ashton*, the lamp case; *Kearney v. L. & S. W. Ry.*, the brick case; *Byrne v. Boadle*, the barrel of flour case).

Where a railway company is bound by Statute to shut the gates of a level-crossing while a train is approaching, and omits to do so, it invites persons to cross the line, and thereby puts them off their guard, and is liable for the injuries which ensue (*Stapley v. L. B. & S. C. Ry.*). The plaintiff must allege and prove, not merely that the company was negligent, but that its negligence caused or materially contributed to the injury (*Wakelin v. L. & S. Ry.*)

An invitation to alight on the stopping of a train without any warning or danger to a passenger, who is so circumstanced as not to be able to alight without danger, such danger not being visible or apparent, amounts to negligence on the part of a railway administration (*Lewis v. L. G. & D. Ry.*). Again, if a person, thinking, on the train stopping, that it has arrived at his station and that he should therefore alight, does so, and by reason of its having overshot the platform, he is injured, the company is liable.

2. Where persons hold themselves out to be persons of skill, they are bound to conduct themselves in a skilful manner. Of this class are (1) Corporations, (2) Directors of Companies, (3) Carriers, (4) Inn-keepers, (5) Doctors, (6) Solicitors, and (7) Bankers (see p. 500). To all such persons the maxim *spondes peritium artis* (if your position implies skill, you must use it) applies.

3. Persons possessing or using dangerous things are bound to exercise more than ordinary care in their control of them, and to keep them safe at their peril. Of this class are persons keeping (1) dangerous animals, (2) dangerous goods, (3) gas, and (4) machinery.

(1). Dangerous animals are of two classes, (i) those that are of a dangerous character which a person must keep at his peril, *e. g.*, a lion, a bear, a wolf, an ape; and (ii) those not of a dangerous nature, *e. g.*, dogs, horses, rams, or bulls. A person who keeps a savage animal of the first class is bound to keep it so far under control as to prevent it indulging its propensities and inflicting injuries. If the animal escapes and hurts anyone, the owner is liable to an action for the damage, without any averment of negligence or default in the securing or taking

care of it. The gist of the action is the keeping of the animal after the knowledge of its mischievous propensities (*May v. Burdett*, the monkey case). In regard to the animals of the second class, the owner is liable for their trespasses, but not for other injuries unless proof of *scienter* is given as to the propensity of the animal itself to do the act in question (*Cox v. Burbidge*, horse kicking a child). Knowledge of the defendant that the animal was prone to injure mankind must be established (*Osborne v. Chocqueel*, dog biting a man), and, for this, a single instance of the ferocity of such animals is sufficient notice. Such knowledge may be either personally possessed by the defendant or may have been brought to his notice impliedly by the knowledge of some one whose business connected him with the animal. When the cause of action is an injury which has been inflicted by a dog on an animal, no evidence of *scienter* need be established, and damages are recoverable by the owner of such animal (28 & 29 Vic. c. 60, s. 1).

(2). Under dangerous goods come fire, fire-arms, fire-works, explosive-materials, and poisonous drugs.

Every person who lights a fire is clothed with a heavy responsibility to his neighbours as regards the lighting, safe-keeping, and spreading of such fire. He must keep the fire in his land at his peril. A man is not liable for damage caused by 'domestic fire' provided it originated by accident and without negligence. But if a fire is negligently lighted or kept by a person or his servant, he will be liable for any injury thereby occasioned to his neighbour.

Fire. Loaded fire-arms are highly dangerous things, and more than ordinary care is necessary in dealing with them (*Dixon v. Bell*, the loaded gun case).

Persons are bound to use the very greatest care in the use of fire-works and other highly explosive materials. The law having regard for human life and safety, demands great care from them.

Explosives. Similarly, persons dealing with poisonous drugs are bound to exercise more than ordinary care as the mischief which is likely to occur for want of such care is extremely dangerous to the public (*Thomas v. Winchester*, the balladonna case).

Poisonous drugs. (3). Gas-companies are bound to exercise the very greatest care, for they are using a material of dangerous character.

Gas.

(4). Persons using dangerous machinery  
 Machinery. are required by several Acts to take proper precautions.

4. Where a positive duty is imposed by a statute, something more than ordinary care is required of the person who has to perform it.

As a rule, the onus of proving negligence  
 Burden of proof. is on the plaintiff. He must not merely establish the facts of the defendant's negligence and of his own damage, but must show that the one was the effect of the other.

*First*, where there is *no contract* the plaintiff must prove facts inconsistent with due diligence on the defendant's part. Where the balance is even as to which party is in fault, the one who relies on the negligence of the other is bound to turn the scale. *Secondly*, where there is a contract or a personal undertaking, the plaintiff must prove such contract or undertaking and injury to himself. The mere fact of an injury happening, if unexplained, is evidence of negligence. It is for the defendant to prove that he himself was exercising due care. *Thirdly*, under certain circumstances the mere happening of an accident will afford *prima facie* evidence that it was the result of want of due care: *res ipsa loquitur* (the thing speaks for itself). This is so when (i) the injurious agency was under the management or control of the defendant, and (ii) the accident is such as, in the ordinary course of things, does not happen if those who have the management use proper care (*Byrne v. Boadle*, the barrel case; *Scott v. London Dock Co.*, the bags of sugar case). The defendant may rebut this presumption if he can.



# THE LAW OF TORTS.

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## CHAPTER I.

### NATURE OF TORT.

TORT is the French equivalent of the English word 'wrong,' and of the Roman term *delict*. It was introduced in the English law by the Norman Jurists, and is used at the present day to denote a civil wrong independent of contract, for which compensation in damages is recoverable, in contradistinction to a crime or misdemeanour, which is punished by the criminal law in the interests of society at large. What we now understand by a tort is a breach of some duty between citizens, defined by the general law, which creates a civil cause of action. The duty must be founded in a common right, not in a strictly personal relation, such as those of husband and wife, or parent and child. It must be a duty assigned by law, not dependant on the will of the parties; a breach of contract or of trust is not such, though it may also be a tort in particular circumstances.

There is a well-marked distinction between a **contract** and a **tort**. A contract is founded upon consent: a tort is inflicted against or without consent. A contract necessitates privity between the parties to it: in tort no privity is needed.

A tort must also be distinguished from a pure breach of contract. Firstly, a tort is a violation of a right *in rem*, i.e., of a right vested in some determinate person, either

personally or as a member of the community, and available against *the world at large* : whereas a breach of contract is an infringement of a right *in personam*, *i. e.*, of a right available only against *some determinate person or body*, and in which the community at large has no concern. Secondly, in a breach of contract motive of breach is immaterial : in tort it is often taken into consideration. Thirdly, in a breach of contract, damages are only a compensation : in actions of tort to the property they are generally the same. But where the injury is to the person, or character, or feelings, and the facts disclose fraud, malice, violence, cruelty, or the like, exemplary damages are inflicted for example's sake, and by way of punishing the defendant. Exemplary or vindictive damages cannot be recovered in an action on a contract, except in an action for breach of promise for marriage.

The same conduct, however, may be a tort *and* a breach of contract. Thus, carriers warrant the transportation and delivery of goods entrusted to them ; solicitors and surgeons undertake to discharge their duty with a reasonable amount of skill ; and for any neglect of unskillfulness by individuals belonging to one of these professions, a party who has been injured thereby may maintain an action either in tort for the wrong done, or in contract, at his election (*Broom*).

A **tort** is also widely different from a **crime**. Firstly, a tort is an infringement or privation of the private or civil rights belonging to individuals considered as individuals : whereas a crime is a breach of public rights and duties which affect the whole community considered as a community (*Blackstone, Broom*). Secondly, in tort, the wrong doer has to compensate the injured party : whereas in crime, he is punished by the State. Thirdly, in tort, the action is brought by the injured party : in crime, pro-

ceedings are conducted in the name of the Sovereign (*Austin*).

The same set of circumstances will, in fact, from one point of view constitute a tort, while from another point of view they will amount to a crime. In the case, for instance, of an assault, the right violated is that which every man has that his bodily safety shall be respected, and for the wrong done to this right the sufferer is entitled to get damages. But this is not all. The act of violence is a menace to the safety of society generally, and will therefore be punished by the State. So a libel is said to violate not only the right of an individual not to be defamed, but also the right of the State that no incentive shall be given to a breach of the peace (*Holland*). Where the same wrong is both a crime *and* a tort, its two aspects are not identical; its definition as a crime and as a tort may differ; what is a defence to the tort (as in libel the *truth*) may not be so in the crime; and the object and result of a prosecution and of an action are different.

To constitute a tort, or civil injury, two things must concur, *viz.*, (1) a wrongful act committed by defendant, and (2) actual or legal damage to plaintiff (*R. v. Pagham Commissioners*, 8 B. & C. 362).

### 1. *Wrongful Act.*

It is essential to an action in tort that the act complained of should, under the circumstances, be legally wrongful as regards the party complaining, that is, it must prejudicially affect him in some *legal right*; merely that it will, however directly, do him harm in his interests, is not enough (*Rogers v. Rajendro Dutt*, 8 M. I. A. 103).

An act, which, *prima facie*, would appear to be innocent, may become tortious, if it invades the right of another person. An act done involuntarily, or under the influence of

pressing danger, which the law presumes to be done involuntarily, is not legally wrongful. The crucial test of a legally wrongful act or omission is its prejudicial effect to the *legal right* of another.

Now what is a *legal right*? It has been defined, by Austin, as a 'faculty' which resides in a determinate party or parties by virtue of a given law, and which avails against a party or parties (or answers to a duty lying on a party or parties) other than the party or parties in whom it resides. More briefly it may be said to be the capacity or power residing in a person of controlling, with the assent and assistance of the State, the action of others (*Holland*). Rights available against the world at large are very numerous. They are sub-divided into Private Rights and Public Rights.

Private Rights include all rights which belong to a particular person to the exclusion of the world at large. These rights are: "(1) rights of reputation; (2) rights of bodily safety and freedom; (3) rights of property; or, in other words, rights relative to the mind, body, or estate; and if the general word 'estate' is substituted for 'property,' these three rights will be found to embrace all the personal rights that are known to the law" (per Cave, J., in *Allen v. Flood*, (1898) A. C. 29). Under the third head of rights of property will fall (*a*) those rights and interests, corporeal and incorporeal, which are capable of transfer from one to another, and (*b*) those collateral rights of a personal nature which enables a person to acquire, enjoy and preserve, his private property. Private property is either property in possession, property in action, or property that an individual has a special right to acquire (*Hannam v. Mockett*, 2 B. & C. 937).

Public Rights include those rights which belong in common to the members of the State generally. Every in-

fringement of a Private Right denotes that an injury or wrong has been committed, which is imputable to a person by whose act, omission, or forbearance, it has resulted. But when a Public Right has been invaded by an act or omission not authorised by law, then no action will lie unless in addition to the injury to the public, a special, peculiar and substantial, damage is occasioned to the plaintiff (*Lyon v. Fishmonger's Co.*, 1 A. C. 662). The remedy of the public is by indictment, for, if every member of the public were allowed to bring actions in respect of such invasion, there would be no limit to the number of actions which might be brought (*Winterbottom v. Lord Derby*, L. R. 2 Ex. 316).

Again, to every Right there is a corresponding Duty, and, in the law of torts, Right and Duty are convertible terms. Where the Right is a right to possess or enjoy something, or to do a certain class of acts to the exclusion of all other persons, it is more conveniently spoken of as a Right. Where the Right is a right to have some other person do a certain act, or abstain from a particular class of acts not being acts which the possessor of the right is entitled to do, it is more conveniently spoken of as a Duty (*Addison*). And the Duty with which the law of torts is concerned is the duty to abstain from wilful injury, to respect the property of others, and to use due diligence to avoid causing harm to others.

Liability for a tort arises, therefore, when the wrongful act complained of amounts either to an infringement of a legal Private Right, or the breach or violation of a legal Duty.

## 2. *Legal Damage.*

It is not every damage that is a damage in the eye of the law. There may be a wrong done to a person, but, if it has not caused, what the law terms actual legal damage,

to him, there is no tort in respect of which an action is maintainable. Legal damage is neither identical with actual damage, nor is it necessarily pecuniary. Every invasion of a plaintiff's right, or unauthorized interference with his property, imports legal damage; that is, although a person injured may not suffer any pecuniary loss by the wrongful act, yet if it is shown that there was a violation of some right, the law will presume damage.

In the leading case of *Ashby v. White* (ISM.L.C. 251) Lord Holt, C. J., said: "Every injury imports a damage, though it does not cost the party one farthing, and it is impossible to prove contrary; for damage is not merely pecuniary, but an injury imports a damage, when a man is thereby hindered of his right. As in an action for slanderous words, though a man does not lose a penny by reason of speaking them, yet he shall have an action. So if a man gives another a cuff on the ear, though it cost him nothing, no not so much as a little *diachylon*, yet he shall have his action, for it is a personal injury. So a man shall have an action against another for riding over his ground, though it do him no damage; for it is an invasion of his property, and the other has no right to come there."

It is in this connection said that *injuria sine damno* may be a good ground of action, but *damnum sine* (or *absque*) *injuria* is not actionable at all.

By *damnum* is meant damage in the substantial sense of money, loss of comfort, service, health, or the like. By *injuria* is meant an unauthorized interference, however trivial, with some general right conferred by law on the plaintiff, *e. g.*, the right of excluding others from his house or garden. It is limited to that kind of breach of law which consists in the violation of another's private rights. Justinian defines it as "every action contrary to law."

In cases of *injuria sine damno*, *i. e.*, the infringement of a legal private right without any actual loss or damage, the person whose right is infringed has a cause of action. Wherever a person has sustained what the law calls an 'injury' he may bring an action without being under the necessity of proving special damage, because the injury itself is taken to imply damage. Actual, perceptible, or appreciable loss or detriment is not indispensable as the foundation of an action.

In *India* the same principles have been followed. The Privy Council has decided that "there may be, where a right is interfered with, *injuria sine damno* sufficient to found an action" (*Kali Kissen v. Jodoo Lal*, 5 C. L. R. 101; L. R. 6 I. A. 190). In order to maintain an action for damages for the infringement of a right, it is not necessary to show that there has been any subsequent injury consequent on such infringement (*Ram Chand Chuckerbutty v. Naddiar Chand Ghosh*, 23 W. R., 230; *Ramphul Sahoo v. Misree Lal*, 24 W. R. 97: contra, *Nabakrishna v. Collector of Hooghly*, 2 B. L. R. A. C. 276; *Shama Charan v. Boido Nath*, 11 W. R. 2; *Sitaram v. Kamir*, 15 W. R. 250). Where a plaintiff's legal right is infringed, and there is no evidence of substantial damage, still he is entitled to a decree without damages (*Kaliappa v. Vayapuri*, 2 M. H. C. 442). Where there has been merely an infringement of a legal right without actual damage, the person whose right has been infringed can now bring a suit under section 42 of the Specific Relief Act (I of 1877).

Where the defendant, a returning officer, wrongfully refused to register a duly tendered vote of the plaintiff, a legally qualified voter, and the candidate for whom the vote was tendered was elected, and no loss was suffered by the rejection of the vote, nevertheless it was held that an action lay (*Ashby v. White*, 1 Sm. L. C. 231). Where the roof of a house projects over another man's land, the drip of the rain water is taken to be damaging previous to evidence thereof (*Fay v. Prentice*, 1 C. B. 828). An action will lie against a

banker, having sufficient funds in his hands belonging to a customer, for refusing to honour his cheque, although the customer did not thereby sustain any actual loss or damage (*Mazetti v. Williams*, 1 B. & Ad. 415).

*Indian cases.*—The Maharaja of Dumraon and his predecessors exercised from time immemorial a right to exclusively weigh the goods and produce sold at a *bazar* held upon their land, and to claim all the weighment fees in respect of such transactions as took place there, in lieu of charging rent to the traders for the use of the land. The Maharaja leased to the plaintiff the exclusive right to weigh and receive the weighment-fees in the *bazar*. Held, that a suit brought by the plaintiff for damages for wrongful obstruction of the right of weighing and making the collection, and to have the defendant restrained from offering such wrongful obstruction, was maintainable (*Bhikhi Ojha v. Harakh Kandu*, 9 A. W. N. 89). The refusal of a master of a ship to sign bills of lading otherwise than with an endorsement as to the damage claimed is a wrong that may be fully compensated for in damages (*Grasemann v. Littlepage*, 3 W. R. Ref. 1). A refusal to deliver up an idol, whereby the person demanding it was prevented from performing his turn of worship on a specified date, gives the party aggrieved a right to sue for damages (*Debendro Nath v. Oditachurn*, 3 Cal. 390). Where the plaintiff enjoyed the exclusive right of breaking, on a certain day, a curd-pot in a temple, it was held that the defendants breaking their own curd-pot on that day in that temple was a violation of that right entitling the plaintiff to damages (*Narayan v. Balkrishna*, 9 Bom. H. C. A. C. 413).

*Leading case* :—**Ashby v. White.**

In cases of **damnum sine injuria**, *i. e.*, actual and substantial loss without infringement of any legal right, no action lies. Mere loss in money or money's worth does not of itself constitute legal damage. The most terrible wrongs may be inflicted by one man on another without legal redress being obtainable. "*Damnum* may be *absque injuria*, as, if I have a mill, and my neighbour build another mill, whereby the profit of my mill is diminished I shall have no action against him though it is damage to me...but if a miller disturbs the water from flowing to my mill or doth any nuisance of the like sort, I shall have such action as the law gives" (per Hankford, J., in *Gloucester Grammar School*, Y. B. 11 Hen. IV. 47). Acts done by way of self-defence against a common enemy, such as



the erection of banks to prevent the inroads of the sea ; removal of support to land where no such right of support has been acquired ; and damage caused by acts authorised by statute are instances of *damnum absque injuria*, and damage resulting therefrom is not actionable. Hence the meaning of the maxim is, that loss or detriment is not a ground of action, unless it is the result of a species of wrong of which the law takes cognizance.

Where the defendants had sunk a deep well on their own land to obtain a water supply for the town ; and the making of this well, and the pumping of great quantities of water from it, intercepted water that had formerly found its way into the river by underground channels, and supply of water to the plaintiff's mill was diminished ; it was held that the right claimed by the plaintiff was too large and indefinite to have any foundation in law (*Chesmore v. Richards*, 7 H. L. 349). Where the defendant, a schoolmaster, set up a rival school next door to plaintiff's and boys from plaintiff's school flocked to defendant's, it was held that no action could be maintained (*Gloucester Grammar School Case*, *ubi. sup.*). Where the defendant had sunk a deep pit in his own land, for mining purposes, and kept it dry by pumping in the usual way, with the result of drying up a well which belonged to the plaintiff, and was used by him to supply his cotton mill, it was held that no action lay (*Acton v. Blundell*, 12 M. & W. 324). Where the defendant intended to divert underground water from the springs that supplied the plaintiff corporation's works, not for the benefit of his own land, but in order to drive the corporation to buy him off, it was held that no action lay (*Corporation of Bradford v. Pickles*, (1895) 1 Ch. 145). A mine owner getting his coal in the manner most convenient to himself is not liable, although in consequence he lets water flow into his neighbour's mine, but it should be noted that the damage must not arise from his negligent or malicious conduct (*Smith v. Kenrick*, 7 C. B. 515). Where a person owns a shop which greatly depends for its custom upon its attractive appearance, and a company erects a gasometre hiding it from the public, he cannot sue it ; because although his trade may be ruined by the obstruction, yet the gas company is only doing an act authorized by law, namely building upon its own land (*Butt v. Imperial Gas Co.*, L. R. 2 Ch. App. 158). Where a land owner by working his mines caused a subsidence of his surface, in consequence of which, the rainfall was collected and passed by gravitation and percolation into an adjacent lower coal mine, it was held that the owner of the latter could sustain no action because the right to work a mine was a right of property, which when duly exercised created no responsibility (*Wilson v. Waddell*, 2

App. Cas. 95). The defendant erected an obstruction in a public way, whereby the plaintiff was delayed on several occasions in passing along it, being obliged either to pursue his journey by a less direct route, or else to remove the obstruction. Held, that he could not maintain an action because there was no invasion of an absolute private right, and no substantial damage peculiar to the plaintiff beyond that suffered by the rest of the public (*Winterbottom v. Lord Derby*, L. R. 2 Ex. 316). The seduction of a daughter not in her father's service, actual or constructive (*Blayman v. Haley*, 6 M. & W. 55; *Davies v. Williams*, 10 C. B. 725); the seduction of a daughter in her father's service, unless an actual loss of service accrue (*Eager v. Greenwood*, 1 Ex. 61) are *damna absque injuria*.

Where the marriage of a commoner with a peer of the realm has been dissolved by decree at the instance of the wife, and she afterwards, on marrying a commoner, continues to use the title she acquired by her first marriage, she does not thereby, though having no legal right to the user, commit such a legal wrong against her former husband, or so affect his enjoyment of the incorporeal hereditament he possesses in his title, as to entitle him, in the absence of malice, to an injunction to restrain her use of the title (*Earl Cowley v. Countess Cowley*, (1901) A. C. 450).

*Indian cases.*—Where the servants of a Hindu temple had a right to get the food offered to the idol, but the person who was under an obligation to the idol to offer food did not do so, and the servants brought a suit against him for damages, it was held that the defendant was under no legal obligation to supply food to the temple's servants; and though the result of his omission to supply food to the idol might involve a loss to the plaintiff, it was *damnum absque injuria*, and could not entitle the plaintiff to maintain the present suit (*Dhadphale v. Gurao*, 6 Bom. 122). A pleader cannot sue for damages against a Magistrate for not allowing him to appear for a complainant at an enquiry under section 150, Criminal Procedure Code (1861), as he has no right to appear at such an enquiry (*Bindachari v. Dracup*, 8 Bom. II. C. A. c. 202). Diminution of the value of one man's property caused without injury to the property itself, or to its enjoyment, by the legitimate use of his own property by a neighbour, amounts only to *damnum absque injuria* (*Rattigan v. Mun. Committee of Lahore*, P. R. 106 of 1888). In this case a slaughter house was erected by the Municipality and the Court refused to grant an injunction to stop it as it was a lawful business and did not cause a nuisance but only diminished the value of property in the neighbourhood.

*Leading case* :—**Chasemore v. Richards.**

The result of these two maxims is, that there are moral wrongs for which the law gives no legal remedy, though

they cause great loss or detriment ; and, on the other hand, there are legal wrongs for which the law does give a legal remedy, though there be only a violation of a private right, without actual loss or detriment in the particular case (*Smith*).

It will thus be perceived that to constitute a tort, first, there must be some act or omission on the part of the person committing the tort (the defendant), unauthorized by law, and not being a breach of some duty undertaken by contract. Secondly, this wrongful act or omission must, in some way, inflict an injury, special, private, and peculiar to the plaintiff, as distinguished from an injury to the public at large ; and this may be either by the violation of some right *in rem*, that is to say, some right to which the plaintiff is entitled as against the world at large, or by the infliction on him of some particular and substantial loss of money, health, or material comfort. Thirdly, the wrongful act injurious to the plaintiff must fall within some class of cases for which the recognized legal remedy is an action for damages (*Underhill*).

But the difficulty of arriving at a definition of the term ‘tort’ has not been surmounted by any writers. No definition, helped out even by explanation, can convey a full conception of its meaning. But the labours of Sir Frederick Pollock and Mr. Bigelow have contributed largely to a clearer understanding of ‘tort.’ \*

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\* Following are some of the definitions propounded by various writers on the subject. Pollock thus sums up the normal idea of tort :—

“ Every tort is an act or omission (not being merely the breach of a duty arising out of a personal relation, or undertaken by contract) which is related in one of the following ways to harm (including interference with an absolute right, whether there be measurable actual damage or not), suffered by a determinate person :—

(a) It may be an act which, without lawful justification or

The law of torts is said to be a development of the maxim *ubi jus ibi remedium* (there is no wrong without a remedy). *Jus* signifies here the 'legal authority to do or to demand something'; and *remedium* may be

excuse, is intended by the agent to cause harm, and does cause the harm complained of.

(b) It may be an act in itself contrary to law, or an omission of specific legal duty, which causes harm not intended by the person so acting or omitting.

(c) It may be an act violating an absolute right (especially rights of possession or property), and treated as wrongful without regard to the actor's intention or knowledge. This, as we have seen, is an artificial extension of the general conceptions which are common to English and Roman Law.

(d) It may be an act or omission causing harm which the person so acting or omitting did not intend to cause, but might and should with due diligence have foreseen and prevented.

(e) It may, in special cases, consist merely in not avoiding or preventing harm which the party was bound, absolutely or within limits, to avoid or prevent."

Addison defines tort as "the infringement without legal excuse of a right vested in some determinate person, either personally or as a member of the community, and available against the world at large, or against some person or body exercising public functions as such, whereby damage is caused to such determinate person, either intentionally or as a natural consequence of the infringement."

Underhill defines it as "an act or omission which, independent of contract, is unauthorized by law, and results either in the infringement of some absolute right to which another is entitled, or in the infliction upon him of some substantial loss of money, health, or material comfort, beyond that suffered by the rest of the public, and which infringement or infliction of loss is remediable by an action for damages."

"A tort," remarks Innes, "is usually said to be 'A wrong independent of contract,' *i. e.*, the violation of a right independent of contract; and it will be seen by this statement that the rights, of which a tort is a violation, *are*, in fact, distinct from those arising out of contract. But they are also *distinct from a vast array of other rights*; so that the usual definition is as defective as would be a definition of the horse as '*A class of animal independent of horned cattle*.'" He then gives the following as a more accurate definition:—"A tort is the unauthorized prejudicial interference of some person by act or omission with

defined to be the right of action, or the means given by law, for the recovery or assertion of a right. If a man has a right, he must "have a means to vindicate and maintain it, and a remedy if he is injured in the exercise and enjoyment of it; and, indeed, it is a vain thing to imagine a right without a remedy, for want of right and want of remedy are reciprocal" (per Holt, C. J., in *Ashby v. White*, 2 Ld. Raym. 953; *Winsmore v. Greenbank*, Willes, 577). This maxim does not mean, however, that there is a legal remedy for every moral or political wrong; but only that legal wrong and legal remedy are correlative terms; so that where there is no legal remedy, there is no legal wrong; and hence if all legal remedy for a right is barred, the right is in fact gone (*Bradlaugh v. Gossett*, 12 Q. B. D. 285; *In re Hepburn*, 14 Q. B. D. 399).

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a right *in rem* of another person. The conduct which brings about the prejudicial interference is said to be tortious."

Broom says, "a tort is a wrongful act involving the idea if not of some infraction of law, at all events of some infringement or withholding of a legal right—or some violation of a legal right."

According to Collett, tort means "that which is wrested or crooked, and so that which is contrary to right. A tort has been usually described as a wrong independent of contract. As such, a tort may be described as an invasion by A of B's rights which avail against persons generally, in respect of either property, person, liberty or reputation."

The Privy Council has defined tort as "an act or omission which prejudicially affects another in some legal right" (*Rogers v. Rajendro Dutt*, 2 W. R. 51, 8 M. I. A. 103).

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## CHAPTER II.

### ELEMENTS IN TORT.

IN the preceding Chapter we have seen that in every tort there must be a wrongful act, and legal damage or injury. It is also shewn that every injury imports damage. The terms injury and damage, strictly speaking, signify correlative aspects of the same legal wrong, the one having relation to the actor and the other to the patient of the wrong; and hence damage is the inseverable sequence of injury, but damage cannot be actionable without the co-existence of injury. But though it is accurate language to say that every injury imports damage, it is not so to speak of the fiction of imported damage, in the sense of some fictitious loss which the law assumes, contrary to the fact, to have occurred. **Damage** and **damages** are not equivalent terms. *Damages* are the compensation, in the form of a sum of money, which the Court awards for every injury; but the *damage* which every injury imports is that which is supposed to be compensated by this award of damages; and such damage may consist wholly of a money loss, or partly so, or not at all of such. It is impossible to conceive of an injury or legal wrong that shall not import or result in damage in this sense; and then some award of compensation, however nominal, is obviously incumbent unless wrongs are to go wholly unredressed. Hence the term 'damage' is sometimes used where 'injury' would be more correct; but the two terms, and the notions they signify, though correlative, are perfectly distinct (*Collett*, 3).

In some cases no action will lie unless **actual** or **special damage** is proved. Actual *damnum* is the gist of action in the following cases:—(1) Right to sup-

port of land as between adjacent landowners; (2) Menace; (3) Seduction; (4) Slander (except in four cases); (5) Deceit; (6) Conspiracy or Confederation; (7) Waste; (8) Distress *damage feasant*; (9) Nuisance consisting of damage to property; and (10) Actions to procure persons to break their contracts with other persons. In all these cases it may be said that the injury consists in the special damage.

**Malice.**—This is not a necessary ingredient to the maintenance of an action for tort, where damage is occasioned by a wrongful act, that is, an act which the law esteems an injury. ‘Malice,’ in the common acceptance, means ill-will against a person; but, in its legal sense, it means a wrongful act done intentionally without just cause or excuse (*Bromage v. Prosser*, 4 B. & C. 247). The word ‘wrongful’ implies the infringement of some right, *i. e.*, some right which the law recognises and exists to protect. Where a man has a right to do an act, it is not possible to make his exercise of such right actionable by alleging or proving that his motive in the exercise was spite or malice in the popular sense (per Bowen, L. J., in *Mogul Steamship Co. v. M’Gregor*, 23 Q. B. D. 612). A wrongful act, done knowingly and with a view to its injurious consequences, may, in the sense of law, be malicious; but such malice derives its essential character from the circumstance that the act done constitutes a violation of the law (per Lord Watson in *Allen v. Flood*, (1898) A. C. 1). Where a man has no right to do the act, the fact that he does it out of spite or ill-will does not affect the cause of action, though it may entitle a Court to award exemplary damages, *e. g.*, wanton, persistent, and offensive trespass (*Merest v. Harvey*, 5 Taunt. 442).

‘Malice’ is variously spoken of as ‘express malice,’

‘actual malice,’ or ‘malice in fact,’ and ‘malice in law’ or ‘implied malice.’ The first three terms are identical in meaning. ‘Malice’ is, thus, of two kinds, ‘express malice’ and ‘malice in law.’ ‘Express malice’ is an act done with ill-will towards an individual. It is therefore what is known as malice in ordinary sense. ‘Malice in law’ means an act done wrongfully, and without reasonable and probable cause, and not as in common parlance an act dictated by angry feeling or vindictive motives (per Best, C. J., in *Stockley v. Hornidge*, 8 C. & P. 11; *The Collector of Sea Customs v. Panniar*, 1 Mad. 89). ‘Malice in law’ is ‘implied malice’ as well as ‘express malice’—that is, when from the circumstances of the case, the law will infer malice. But ‘express malice’ is not necessarily ‘malice in law’: for instance, a prosecution set on foot with the most express malice, but with reasonable and probable cause, would give no ground for an action to recover damages for malicious prosecution. Again ‘malice in law’ depends upon knowledge, ‘malice in fact’ upon motive.

The decision of the House of Lords in *Allen v. Flood*, (1898, A. C. 1) has settled that an act not otherwise unlawful cannot generally be made actionable by an averment that it was done with malice or evil motive. A malicious motive *per se* does not amount to an *injuria* or legal wrong. The root of the principle is that, in any legal question, malice depends, not upon the evil motive which influenced the mind of the actor, but upon the illegal character of the act which he contemplated and committed (per Lord Watson, *ibid*). No use of property which would be legal if due to a proper motive can become illegal because it is prompted by a motive which is improper or malicious (*Bradford Corporation v. Pickles*, (1895) A. C. 587).



In certain classes of actions it has been usual to say that the wrongful act was done maliciously, *e. g.*, libel and malicious prosecution. But since the decision in *Allen v. Flood*, these two cases stand by themselves as the only cases in which motive is essential to constitute the legal wrong.

**Intention : Motive.**—When the doer of an act adverts to a consequence of his act and desires it to follow, he is said to intend that consequence (*Markby*). The obligation to make reparation for the damage caused by the wrongful act against right or law, arises from the fault, and not from the intention. A thing, which is not a legal injury or wrong, is not made actionable by being done with a bad intent. In *Allen v. Flood*, Lord Watson said : “Although the rule may be otherwise with regard to crimes, the law of England does not take into account motive as constituting an element of civil wrong. Any invasion of the civil rights of another person is in itself a legal wrong, carrying with it liability to repair its necessary or natural consequences, in so far as these are injurious to the person whose right is infringed, whether the motive which prompted it be good, bad, or indifferent.” An act which does not amount to a legal injury cannot be actionable because it is done with a bad intent (Park, B., in *Stevenson v. Newham*, 13 C. B. 297).

It is no defence to an action in tort for the wrong-doer to plead that he did not intend to cause damage, if damage has resulted owing to an act or omission on his part which is actively or passively the effect of his volition. Bodily injury, though the consequences of a lawful act or a mere mischance, may be a tort and the existence of an evil intention in the mind of the wrong-doer is not essential ; so much so, that even a lunatic, much more a drunken person, will be

civilly answerable for his torts, although wholly incapable of design.

Thus, we have the maxim 'Every man is presumed to intend and to know the natural and ordinary consequences of his acts;' and this presumption is not rebutted merely by proof that he did not at the time attend to or think of such consequences, or hoped or expected that they would not follow. Hence the defendant will be liable in every case for the natural and necessary consequences of his act, whether he in fact contemplated them or not. He will be liable also for every consequence which, at the time of committing the tort, he did in fact contemplate as a probable result of his act. But if a particular result is not a natural or necessary consequence of the defendant's act, and can only be recognised as a probable consequence in the light of certain special circumstances peculiar to the particular case, then the defendant will not be responsible for that result, unless he was aware of those special circumstances at the time when he committed the tort.

Pollock says that sometimes we may have independent proof of the intention of a man doing an act; as if he announced it beforehand by threats or boasting of what he would do. But often times the act itself is the chief or sole proof of the intention with which it is done. We say that intention is presumed, meaning that it does not matter whether intention can be proved or not; nay, more, it would in the majority of cases make no difference if the wrong-doer could disprove it. For although we do not care whether the man intended the particular consequence or not, we have in mind such consequences as he might have intended, or, without exactly intending them, contemplated as possible; so that it would not be absurd to infer as a

fact that he either did mean them to ensue, or recklessly put aside the risk of some such consequences ensuing. This is the limit introduced by such terms as 'natural,' or 'natural and probable', consequences. What is natural and probable in this sense is commonly, but not always, obvious. There are consequences which no man could, with common sense and observation, help foreseeing. There are others which no human prudence would have foreseen.

Where defendant, a balloonist, came down in plaintiff's garden whereby a crowd of people broke into the garden, and trod down vegetables and flowers, the defendant's descent was considered to be a trespass, and he was held liable for the damage done by the balloon and also by the crowd (*Guille v. Swan*, 19 Johns. 381). Plaintiff was looking at defendant, who was uncocking a gun, which went off and wounded the plaintiff; it was held that he could recover (*Underwood v. Hewson*, 1 Str. 596). Defendant in mowing his own land, by accident, and as he alleged unintentionally, mowed a little of the plaintiff's land. He was held liable: "the fact being voluntary, his intention and knowledge were not traversable, they cannot be known." (*Buseley v. Clarkson*, 3 Lev. 37).

For further cases on the question of liability of a person for the consequences of his act (whether he intended them to follow or not) see the Chapter on Remedies (Ch. IX).

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## CHAPTER III.

### PERSONAL DISABILITIES.

THERE are certain persons who cannot sue, whilst there are others who cannot be sued, in tort owing to personal disability.

#### *Who cannot sue.*

1. A **convict** whose sentence is in force and unexpired, and who is not "lawfully at large under any license" cannot sue for an injury to his *property*, or for recovery of a debt (33 & 34 Vic. c. 23, ss. 8, 30). By 'convict' is meant any person against whom judgment of death or penal servitude shall have been pronounced on any charge of treason or felony (33 & 34 Vict. c. 23, s. 6). By this Statute the right to sue for any injury to the *property* of a convict is vested in the administrator or interim curator, as the case may be, during the time that the convict is subject to the operation of the Statute, that is to say, until the convict's death, bankruptcy, or the completion of his term of imprisonment, or until he shall have received a Royal pardon (ss. 10, 24). A felon, who is not a convict as above defined, such as one who has been sentenced to a term of imprisonment only, may sue for torts to his *property*.

At Common law a convict might sue for any personal wrong, such as assault or slander, and there is nothing to prevent him still from doing so.

2. An **alien enemy** cannot sue in his own right (*De Wahl v. Braune*, 1 H. & N. 178; 25 L. J. Ex. 343). He cannot maintain an action unless by virtue of an Order in Council, or duly licensed, or unless he comes into the British dominions under a flag of truce or some other act

of public authority putting him in the Queen's peace (*The Hoop*, 1 Rob. C. 196). An alien enemy, residing in England with the license and permission of the Crown, has the same rights and privileges as an alien friend (*Wells v. Williams*, 1 Salk. 46; *Casseres v. Bell*, 8 T. R. 166).

*Indian law.*—Alien enemies residing in British India with the permission of Governor-General in Council may sue in the Courts of British India as if they were subjects of His Majesty (s. 430, Civil Procedure Code, Act XIV of 1882).

3. A wife cannot sue her husband for a tort, nor can a husband his wife. The wife may sue her husband for the protection and security of her own separate property; but further than that, no husband or wife shall be entitled to sue the other in tort. Thus, she cannot sue him in a civil action for a personal wrong such as assault, libel, or injury by negligence. The inability in general of the wife to sue her husband for a tort is founded not merely upon a rule of legal procedure necessitating the joinder of the husband as a co-plaintiff, but upon the principle that husband and wife form in the eye of the law one person. Divorce does not enable the divorced wife to sue her husband for a personal tort committed during the coverture (*Phillips v. Barnett*, 1 Q. B. D. 436). But a wife living apart from her husband under a separation order obtained by virtue of the Summary Jurisdiction Act, 1895, can maintain an action of libel against him (*Robinson v. Robinson*, 13 T. L. R. 564). At Common law a married woman could not sue unless her husband was joined with her as plaintiff, but now by the Married Women's Property Act, 1882, she may sue in tort in all respects as if she were a *feme sole*.

4. A corporation cannot maintain an action for libel charging the corporation with corruption, for it is only the

individuals, and not the corporation in its corporate capacity, who can be guilty of such an offence (*Mayor of Manchester v. Williams*, (1891) 1 Q. B. 94).

5. A child cannot maintain an action for injuries sustained while *en ventre sa mere* (*Walker v. G. N. Ry.*, 28 L. R. Ir. 69).

6. A bankrupt cannot sue for any direct tort to his *property* belonging to him at the date of his bankruptcy (*Hodgson v. Sidney*, L. R. 1 Ex. 313); but for injuries of a *personal* character, such as libel, or assault, or the seduction of his servant, a bankrupt may sue (*Howard v. Crowther*, 8 M. & W. 601).

In some cases the act complained of may be such as to give rise to both kinds of damage, a damage to property, and a damage of a personal character; and in such cases the question as to what extent the cause of action will pass to trustees seems to depend upon the following rules:—

(a) If only one of the two classes of damage suffered is the direct consequence of the defendant's act, and the other is consequential merely, so that there is but one cause of action, then, if the damage which is directly suffered is a damage to property, the cause of action passes to the trustee, and the bankrupt's remedy in respect of the injury to himself is gone; but if the damage which is directly suffered is of a personal character, the whole cause of action remains in the bankrupt.

(b) If the act of the defendant be such as to give rise simultaneously to two distinct causes of action, one in respect of a damage to property, the other in respect of a personal damage, as for instance, where a carriage which the bankrupt is driving is run into, and both carriage and driver are injured (*Brunsdon v. Humphrey*, 14 Q. B. D.

141), the trustee may sue for the one and the bankrupt for the other (*Rogers v. Spence*, 12 Cl. & F. 720).

(c) Intermediate between the two above classes of cases is that of a trespass to land or goods of which the bankrupt has the bare possession, and the trustee has the property; in which case it appears that the bankrupt may sue for the invasion of his possession, and recover damages nominal or substantial according as the trespass was or was not accompanied with matter of aggravation, and the trustee may sue in respect of his property or right of possession and recover damages for any injury done to the land or any damage to, or conversion of, the goods (*C. & L.*, 36).

Any property which a bankrupt may acquire after his adjudication, and before his discharge, is, until the trustee intervenes, to be regarded as the property of the bankrupt (*Cohen v. Mitchell*, 25 Q. B. D. 262). For any torts to such property, the bankrupt may sue.

### *Who cannot be sued.*

1. **The Sovereign.**—The person of the King is by law made up of two bodies: a natural body, subject to infancy, infirmity, sickness, and death; and a political body, perfect, powerful, and perpetual (*Bagshaw*, 29). These two bodies are inseparably united together, so that they may be distinguished, but cannot be divided. Now it is an ancient and fundamental principle of the English constitution, that the King can do no wrong. It means, first, that the Sovereign, individually and personally, and in his natural capacity, is independent of, and is not amenable to, any other earthly power or jurisdiction; and that anything amiss in the condition of public affairs is not to be imputed to the King; so as to render him personally

answerable for it to his people. Secondly, it means that the prerogative of the Crown extends not to do any injury, because, being created for the benefit of the people, it cannot be exerted to their prejudice; and it is therefore a fundamental general rule, that the King cannot sanction an act forbidden by law. As the fountain of justice, no Court can have compulsory jurisdiction over the Sovereign; an action for a personal wrong, will not, therefore, lie against the King (*Broom*). The remedy known as petition of right will not lie for a tort (*Canterbury v. R.*, 4 S. T. N. S. 767; Hale, P. C., i, 43).

This exemption of the Sovereign from liability is personal; it does not extend to public officers of State acting on behalf of the Crown, for the maxim 'King can do no wrong' involves the proposition that he cannot authorise a wrong. The authority of the Crown will afford no defence to an action brought for an illegal act committed by an officer of the Crown.

2. **Foreign Sovereigns.**—The English Courts have no jurisdiction over an independent foreign Sovereign, unless he submits to the jurisdiction in the face of the Court (*Mighell v. Sultan of Johore*, (1894) 1 Q. B. 149). An action cannot be maintained against such foreign potentate for anything done or omitted to be done by him in his public capacity as representative of the nation of which he is the head (*De Haer v. Portugal (Queen)*, *Wandsworth v. Spain (Queen)*, 17 Q. B. 171; 20 L. J. Q. B. 488). This principle holds good even if he is also a British subject who has taken the oath of allegiance, and is in England exercising his rights as such subject (*Brunswick (Duke) v. Hanover (King)*, 2 H. L. 1; 13 L. J. Ch. 107). English Courts cannot interfere with the prerogative rights of the Sovereign of another country (*Gladstone v. Ottoman*



*Bank*, 1 H. & M. 505; 32 L. J. Ch. 228). As a consequence of the absolute independence of every sovereign authority, and of the international comity which induces every sovereign State, to respect the independence of every other sovereign State, each and every one declines to exercise by means of any of its Courts, any of its territorial jurisdiction over the person of any Sovereign or Ambassador of any other State, or over the public property of any State which is destined to its public use, or over the property of any Ambassador, though such Sovereign, Ambassador or property be within its territory, and therefore, but for the common agreement, subject to its jurisdiction (*The Parliament Belge*, 5 P. D. 197).

3. **Ambassadors of Foreign Powers.** A public minister duly accredited to the British Sovereign by a Foreign State is privileged from all liability to be sued in civil actions (*The Magdalena Steam Navigation Co. v. Martin*, 28 L. J. Q. B. 310). This applies even to a British subject accredited to Great Britain by a Foreign Government as a member of its embassy (*Macartney v. Garbutt*, 24 Q. B. D. 368). The immunity extends not only to the person of the minister but to his family and suite, secretaries of legation and other secretaries, his servants, moveable effects, and the house in which he resides.

A foreign Sovereign or Ambassador may waive his privilege; but nothing short of appearance in Court will amount to submission to its jurisdiction.

4. Persons who from **extreme youth** or **unsoundness of mind** are mentally incapable of contriving fraud or malice.

**Infancy** is no protection against a claim founded upon a tort committed by an infant. In those cases of tort in which intention, knowledge, malice, or some other condi-

tion of the mind of the wrong-doer, forms an essential ingredient of the civil injury complained of, *extreme* youth may afford a defence which would not be open to an adult wrong-doer, or to an infant wrong-doer of a more *advanced* age. Infants are liable for wrongs of omission as well as for wrongs of commission; and with respect to wrongs of omission probably no better criterion of liability can be suggested than the homely one, "Was he old enough to know better?" (*E. L. E.*). Thus, infants are held liable for an assault, false imprisonment, libel, slander (*Hodsman v. Grissel*, Noy. 129; *Defries v. Davies*, 1 Bing. N. C. 692); seduction, trespass (*Bacon*); wrongfully detaining goods (*Mills v. Graham*, 1 B. & P. N. R. 140); fraud (*Re Lush*, L. R. 4 Ch. App. 591); embezzling money (*Bristow v. Eastman*, Peake N. P. C. 291); selling spurious articles, representing to have been manufactured by others (*Chubb v. Griffiths*, 35 Beav. 127); and for nuisances and injuries to their neighbours, arising from the negligent use and management of their property.

An infant cannot take advantage of his own fraud, *i. e.*, he may be compelled to specific restitution, where that is possible, of anything he has obtained by deceit, nor can he hold other persons liable for acts done on the faith of his false statements, which would have been duly done, if the statement had been true.

In that class of cases in which, under the old system of pleading, it was optional to sue in contract or in tort, the rule is that a contract cannot be converted into a tort in order to fix an infant with liability (*Jennings v. Rundall*, 8 T. R. 335). Thus, no action lies against an infant for fraudulently representing himself to be of full age, and thereby inducing a person to contract with him (*Slikeman v. Dawson*, 1 DeG. & Sm. 90, 113).

Where defendant, an infant, hired a mare for riding, and injured it by over-riding, his infancy was held to be a good defence (*Jennings v. Rundall*, 8 T. R. 335). But, where the infant defendant was expressly told that the mare was unfit for leaping, and the mare was put at a fence, and in attempting to take it fell upon a stake, and was injured and died; it was held that he had committed an actionable wrong, and was, therefore, liable irrespective of the contract (*Burnard v. Haggis*, 14 C. B. N. S. 45). An infant is not responsible for falsely affirming goods to be his own goods, and that he had a perfect right to sell them, and thereby inducing the plaintiff to purchase them (*Grove v. Nevel*, 1 Keb. 1778); for if such actions were maintainable, all the pleas of infancy would be taken away, as such affirmations exist in every contract.

Where an infant had obtained a lease of a furnished house by representing himself to be a responsible person and of full age, the lease was declared void, and the lessor to be entitled to delivery of possession, and to an injunction to restrain the lessee from dealing with the furniture and effects, but not to damages for use and occupation (*Fairhurst v. Liverpool Adephi Loan Association*, 9 Ex. 422).

*Indian cases.*—A, an infant, borrowed money from B, on a mortgage of certain immovable property. B, believing that A was of age, advanced the money. When B brought his suit, on the mortgage, A pleaded infancy, but B based his claim on the fraudulent representations of A as to his age; it was held that where an infant was not liable on his contract, the plaintiff could not succeed, against him, by framing his action in tort and that what the plaintiff could not recover *ex contractu* he could not be permitted to recover by simply changing the form of his suit, that is, by framing it *ex delicto*, and that as specific restitution was impossible the plaintiff must fail in his suit (*Dhanmul v. Ram Chander*, 24 Cal. 265).

A lunatic is, in general, liable for a tort. He is liable if the tort is committed by him while in that condition of mind which is essential to liability in a sane person. If a lunatic hurt a man he shall be liable; but a lunatic, like an infant, is not liable for fraud or malice unless the Court be of opinion that he was capable of conceiving such intention.

An action of trespass may be brought against a lunatic, notwithstanding he is incapable of design; for wherever one person receives an injury through the voluntary act of another, this is a trespass, although there were

no design to injure (*Bacon*). Lunacy does not give a general charter to commit wrongs. But there is no reported case of an action of tort having been brought against a lunatic.

In American Courts it has been held that lunatics are liable for torts in general, but not for those torts where intention is a necessary element of the tort, *e. g.*, defamation, or malicious prosecution; and it has been stated that where vindictive damages might be given against a sane person the measure of damages against a lunatic would be merely the injury suffered by the plaintiff (*Addison*). He is liable to an action for libel or slander, unless his insanity is well known to all who hear or read his words, in which case no damage will be incurred, as the words would produce no effect.

The same principles would apply to the acts of a person in an epileptic fit.

In an action brought against an innkeeper on the custom of the realm for loss of a guest's goods, the plea was that he was of non-sane memory; but it was held bad: "for the defendant if he will keep an inn ought at his peril to keep safely his guest's goods; and it lieth not in him to disable himself by plea of non-sane memory, no more than in debt upon an obligation" (*Cross v. Andrews*, Cro, Eliz 622).

**Drunkenness**, as a rule being voluntarily assumed, is no excuse for the commission of a crime: it will hardly therefore excuse a tort. The act, although at the time of commission involuntary, becomes by reflection voluntary, on account of the voluntary assumption of the state of mind which caused its commission. Or, the making of beast of oneself may be likened to the keeping of a beast, and as in some cases the *scienter* is presumed, so it will be presumed that a man knows that if he gets drunk he will be likely to commit acts which will produce injuries to other people (*Piggott*).

5. **Corporation.**—The older view of a corporation

was, that as it had no soul and no body, it could not be excommunicated or outlawed ; or commit treason or felony ; or beat or be beaten ; or act as an executor ; but these views have in modern days been much modified (*E. L. E.*). The whole tenour of authorities, from *Yarborough v. Bank of England* (16 East 6) down to the present, shows that an action for a wrong lies against a corporation where (1) the thing done is within the purpose of the incorporation, and (2) it has been done in such a manner as to constitute what would be an actionable wrong if done by a private individual. The principles determining the responsibility of a principal for the acts of his agent will also govern the liability of a corporation for the acts of its agents. These principles will be discussed hereafter. (*Vide* Chapter VIII).

To fix a corporation with liability for the acts of its agents, two conditions must be fulfilled : (1) the act must have been within the scope of the agent's employment ; and (2) the employment must have been within the scope of the corporate powers. Otherwise, the corporation will not be liable, and its directors, servants, or other persons, who authorize or commit a tort, can alone be sued (*Edward v. M. Ry.* 6 Q. B. D. 287).

Where bodies of persons, incorporated or not, are in charge of works of a private nature, they are in their corporate or quasi-corporate capacity responsible for their work no less than if they were private owners ; and this whether they derive any profit from the undertaking or not (*Mersey Docks Trustees v. Gibbs*, 35 L. J. Ex. 225).

The employment of policemen by a railway company to protect its property is an act within the scope of the incorporation of the company ; and consequently a company was held responsible for a malicious prosecution carried out by one of such policemen (*Edwards v. M. Ry.*, 6 Q. B. D. 287. See also *Henderson v. Midland Ry.*, 25 L. T. 881 ; *Rayson v. S. L. Tramway Co.*, (1893) 2 Q. B. 304 ; *Cornford v. Carlton Bank*, (1899) 1 Q. B. 392, (1900) 1 Q. B. 22). A corporation can be sued for fraud, deceit,

trespass, or assault (*Butler v. Manchester & Sheffield Ry.*, 21 Q. B. D. 207). It is answerable for the misfeasances of its servants (*Green v. London Omnibus Co.*, 7 C. B. N. S. 290); it may have the *scienter* imputed to it (*Stiles v. Cardiff Steam Navigation Co.*, 33 L. J. Q. B. 318).

Corporations cannot be held responsible for a fraudulent misrepresentation as to the credit of a third person, owing to the difficulty of complying with the terms of Lord Tenterden's Act, which requires that the representation should be in writing, *personally* signed by the party to be charged (*C. & L.*, 51).

6. A married woman at Common law could not be sued in tort unless her husband was joined with her as defendant. No doubt she was as liable as anybody else in all real cases of tort; but, inasmuch as in the eye of the law she had no property of her own with which she could pay damages, her husband had to be sued jointly with her (*Liverpool A. L. Association v. Fairhurst*, 9 Ex. R. 422; *Capel v. Powell*, 17 C. B. N. S. 743). Her torts were therefore regarded as torts of her husband, and it was even said that a married woman could not commit torts, but could merely create a liability against her husband (*Wainford v. Heyl*, L. R. 20 Eq. 321). He was answerable for all his wife's torts during *coverture*, but the action must have been against them both jointly. The duration of the husband's liability varied according as he had or had not authorised the tort committed by the wife. If he had authorised it he was liable to be sued at any time, but if not he was to be sued during the *coverture* (*Capel v. Powell*, 17 C. B. N. S. 743). As soon as the *coverture* came to an end by divorce, or by the wife's death, the husband's liability ceased, even though an action to establish it may have already been commenced. After the death of the husband the wife may be sued alone for all her tortious acts. If the husband died before judgment the widow became personally liable as a *feme sole* for torts committed by her during marriage (*Wright*

*v. Leonard*, 11 C. B. N. S. 258). For torts committed by a woman *before* marriage her husband was also liable at Common law to the full extent of the damages recovered.

Under the Married Women's Property Act, 1882, (45 & 46 Vic. c. 75) "a married woman shall be capable of being sued...in tort in all respects as if she were a *feme sole*, and her husband need not be joined with her as defendant, or be made a party to any action or other legal proceeding...taken against her; and any damages or costs recovered against her in any such action or proceeding shall be payable out of her separate property and not otherwise" [s. 1 (2)]. It seems that her liability for torts is not conditional upon her possessing separate estate; on proof of the tort the plaintiff is entitled to judgment, but if the defendant has no separate estate, the judgment cannot be executed. This enactment, it has been held, does not affect the Common law liability of a husband for his wife's torts; and consequently a plaintiff can elect whether he would sue the wife alone or join her husband as co-defendant with her (*Seroka v. Kattenburg*, 17 Q. B. D. 177).

In respect of her *ante-nuptial* torts she may also be sued alone and sums recovered against her are to be paid out of her separate property. But her husband is also liable to the extent of the property which he has obtained through her, and he may be sued either jointly with her or alone (45 & 46 Vic. c. 75, ss. 13, 14, 15).

A husband shall not be liable for torts committed by a wife while separated from him under a *judicial separation* (20 & 21 Vict. c. 85, s. 26).

A husband remains liable for his wife's torts committed *during* coverture although living apart from him under a *voluntary separation* (*Head v. Briscoe*, 5 C. & P. 484). Recently, it has been further held that a husband, who is living apart from his wife under a *separation deed*, by

which she had a large allowance from her husband, is liable to be sued jointly with his wife for a libel written by her without his knowledge (*Utley v. Metre Publishing Co.*, 17 T. L. R. 720).



## CHAPTER IV.

### FELONIOUS TORTS.

THE doctrine of "the merger of a tort in felony" has a history of its own. In 1606, it was declared that there could not be a double proceeding, civil and criminal, in respect of the same act. The felony, it was said, "drowns the particular offence, and private wrong" (per Tanfield, J., in *Higgins v. Butcher*, Yelv. 89; Jones, J., in *Markham v. Cobbe*, Noy. 82). This dictum is the first authority for the notion that the civil remedy was merged in the felony. In 1652, it was laid down that, although there was no actual merger, it was a *condition precedent* to the accruing of the cause of action that the public right should have been vindicated by the prosecution of the felon (*Dawkes v. Coveleigh*, Sty. 346; Doderidge and Whitelock, J.J., in *Markham v. Cobbe*, *sup.*). This view was adopted by Lord Ellenborough in 1810 (*Crosby v. Leng*, 12 East, 409), by Lord Tenterden in 1827 (*Stone v. Marsh*, 6 B. & C. 551), and by Lord Cranworth in 1845 (*White v. Spettigue*, 13 M. & W. 603, over-ruling *Gimson v. Woodfull* (1825) 2 C. & P. 41, in which it was decided that no civil action lay). But, in 1837, the rule was effectually applied to exclude a proof in bankruptcy (*Ex parte Elliot*, 3 M. & A. 110). Until 1870, it was practically useless to bring an action, as, till then, on conviction of felony, the felon's property was forfeited to the Crown. In 1872 arose the leading case of *Wells v. Abraham* (L. R. 7 Q. B. 554), in which Cockburn, C. J., said: "Where an injury amounts to an infringement of the civil rights of an individual, and at the same time to a felonious wrong, the civil remedy, that is the right of redress by action, is *suspended* until the party inflicting the injury has been prosecuted." Blackburn, J.,

said that there were many dicta of high authority that in such cases "it is the *duty* of the person injured to prosecute for the criminal offence, *before* he can pursue his remedy by action for the private injury"; and Lush, J., said: "he cannot obtain redress by civil action *until* he has satisfied that requirement." Both these eminent Judges threw great doubt as to the means by which that duty was to be enforced. They said that it was no ground for the Judge at the trial to direct a non-suit (over-ruling *Wellock v. Constantine*, 2 H. & C. 146), and that the omission to sue could not form the subject of a plea in bar of the action. In *Wells v. Abraham*, Cockburn, C. J., suggested that "if an action were brought against a person who was either in the course of being prosecuted for felony, or was liable to be prosecuted for felony, the summary jurisdiction of the Court might be invoked to stay proceedings." And Blackburn, J., said: "I do not see how a plaintiff can be prevented from trying his action, unless the Court, acting under its summary jurisdiction, interfere." In this uncertain state of the law the question was discussed, in 1879, in the case of *Ex parte Ball, re Shepherd* (10 Ch. D. 667). In this case Lord Bramwell severely criticised the rule and pointed out the various difficulties regarding its application. He said: "I can think of only four possible ways:—

- (1) That no cause of action arises at all out of a felony
- (2) That it does not arise till prosecution.
- (3) That it arises on the act, but is suspended till prosecution.
- (4) That there is neither defence to nor suspension of the claim by or at the instance of the felon: but that the Court, of its own motion, or on the suggestion of the Crown, should stay proceedings till public justice is satisfied. It must be admitted that there are great difficulties in the way of each of these theories. That the first is not true is shewn by *Marsh v. Keating* (1 Bing. N. C. 198), where it

was held, prosecution being impossible, a felony gave rise to a recoverable debt. It is difficult to suppose that the second supposed solution of the problem is correct. That would be to make the cause of action the act of the felon, *plus* a prosecution. The cause of action would not arise till after both. Till then the Statute of Limitation would not run...where the felon had died it would be impossible. The third possible way is attended by difficulties. The suspension of a cause of action is a thing nearly unknown to the law...Then is the fourth solution right? Nobody ever heard of such a thing; nobody in any case or book ever suggested it till Mr. Justice Blackburn did as a possibility.\* Is it left to the Court to find it out on the pleadings? If it appears on the trial is the Judge to discharge the jury? How is the Crown to know of it? These are difficulties, then, in all the possible ways in which one can suppose this impediment to be set up to the prosecution of an action. But again, suppose it can be, what is the result? It has been held that when the felon is executed for another felony, the claim may be maintained. What is to happen when he dies a natural death, when he goes beyond the jurisdiction, when there is a prosecution and an acquittal from collusion or carelessness by some prosecutor other than the party injured?" Baggallay, L. J., laid down: "(1) That a felonious act may give rise to a maintainable action. (2) That the cause of action arises upon the commission of the offence. (3) That, notwithstanding the existence of the cause of action, the policy of the law will not allow the person injured to seek civil redress, if he has failed in his duty of bringing or endeavouring to bring the felon to justice. (4) That this rule has no application to cases in which the offender has been brought to justice at the instance of some other person, or

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\* In *Wells v. Abraham*, Blackburn, J., suggested this view.

in which prosecution is impossible by reason of the death or escape of the felon. (5) That the remedy by proof in bankruptcy is subject to the same principles of public policy as those which affect the seeking of civil redress by action." Unfortunately, it was not necessary in this case to decide the point. But, in 1881, in the case of *Midland Insurance Co. v. Smith* (6 Q. B. D. 574), Watkins, J., after reviewing all the authorities on the question, said that in *Ex parte Ball* "the doctrine that it was a *condition precedent* to the enforcing the civil remedy that the felon should have been first prosecuted, if it ever had any solid foundation, was finally exploded." He fully agreed with the propositions laid down by Baggallay, L. J., and held "that the true principle of the Common law is that there is neither a merger of the civil right nor is it a strict *condition precedent* to such right that there shall have been a prosecution of the felon, but that there is a *duty* imposed upon the injured person, not to resort to the prosecution of his private suit to the *neglect* and *exclusion* of the vindication of the public law." Finally came, in 1885, the case of *Appleby v. Franklin* (17 Q. B. D. 93), in which Wills, J., decided "no action can be maintained for a civil injury resulting to the plaintiff from the felonious act on the part of the defendant, *until* public justice has been vindicated by a prosecution of the criminal. It is equally clear that the objection to the maintenance of the action cannot be raised by plea, or by demurrer, or, as it would seem, by way of non-suit, inasmuch as the cause of action still subsists." "The principle upon which this rule is founded seems to be that the interest of the public requires that the law shall be vindicated *before* the individual who is wronged shall be permitted to have recourse to a civil remedy" (per Huddleston, B., in *ibid.*). The views of Cockburn, C. J., and Blackburn, J., in *Wells v. Abraham*, regard-

ing the invoking of summary jurisdiction of the Court to stay proceedings were approved. The Court was even prepared to enforce the rule by striking out the statement of claim, but the case went off on another point. The attention of the Court was, unfortunately, not drawn to the cases of *Ex parte Ball* and *The Midland Insurance Co. v. Smith*. Since this decision no case has arisen regarding the application of this rule, but, in 1891, Lord Halsbury, L. C., has incidentally remarked, though the question was not before him, "where a claim is founded upon a matter which might be the subject of criminal proceedings, the person seeking to enforce it must prosecute for the criminal offence *before* he can sue in a civil action" (*Vernon v. Watson*, (1891) 2 Q. B. 290). Thus the law on this subject still remains in a very hazy and unsatisfactory condition.

But it has been expressly decided that this rule does not apply—

(1) To misdemeanours (*Fissington v. Hutchinson*, 15 L. T. 390).

(2) Where the plaintiff is not the person injured by the felonious act of the defendant (*Osborn v. Gillett*, L. R. 8 Ex. 88; *Appleby v. Franklin*, 17 Q. B. D. 93).

(3) Where the defendant is some person other than the person guilty of the crime (*White v. Spettigue*, 14 L. J. Ex. 99; 13 M. & W. 603).

*Indian law.*—(a) *Presidency towns.*—The Madras High Court has laid down that a Hindu or Mahomedan, whose civil rights have been infringed by an act which is also a non-compoundable offence, is not bound to prosecute the offender before maintaining his civil action, nor is his right to prosecute his action suspended until the offender is brought to justice (*Abdul Kawder v. Muhammad*, 4 Mad. 410). But the Calcutta High Court has ruled in an early

case, that where a person brings a suit alleging a state of facts which amount to felony, he must show that he has done his best to procure a conviction on the criminal charge before the Civil Court will entertain such a suit (*Coonamull v. Sarno*, 2 Ind. Jur. N. S. 187).

(b) *Mofussil*.—There is no law which requires an injured person in any case to institute criminal proceedings before bringing his action (*Shama Churn v. Bhola Nath*, 6 W. R. 9; *Viranna v. Nagayyah*, 3 Mad. 9; *Jina v. Jodha*, 1 Bom. H. C. 2; *Choitunno v. Zumeerooddee*, 18 W. R. 27). The failure of an injured party to institute criminal proceedings does not deprive him of his right to bring a suit in a Civil Court to recover damages for abuse (*Shree Nath v. Komul*, 16 W. R. 83). Even if a criminal charge against a defendant is dismissed, that does not prevent the plaintiff from suing afterwards in a Civil Court (*Roopa Bewa v. Ramcoomar*, Marsh 248; 2 Hay 13).

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## CHAPTER V.

### FOREIGN TORTS.

TORTS committed abroad have always been triable in English Courts, provided they expressly fulfilled the following conditions:—

(1). The wrong must be of such a character that it would have been actionable if committed in this country (*The Halley*, L. R. 2 P. C. 193; *Carr v. Francis & Co.*, (1901) A. C. 176).

(2). The act must not have been justifiable by the law of the place where it was committed (*Phillips v. Eyre*, L. R. 6 Q. B. 1; *Carr v. Francis*, *sup.*). It is not necessary that the wrong should have been *actionable* where committed; it is sufficient if it was *unlawful*.

(3). The act complained of must not be a tort of a purely local nature, such as a trespass to, or ouster from, land (*British South African Co. v. The Companhia de Mocambique*, (1893) A. C. 602), or a nuisance affecting hereditaments.

No action will lie in England for an act committed in a foreign country if it either was lawful by the law of that country at the time of its commission (*Blad v. Bamfield*, 3 Swan. 603), or was excusable, or was subsequently legitimized by virtue of *ex post facto* legislation in such country (*Phillips v. Eyre*, *ubi. sup.*; *The M. Moxham*, 1 P. D. 107).

Though the act complained of should be wrongful both by the law of England and by the law of the country where it was committed, yet it is not necessary that it should involve liability to civil proceedings in the foreign country. Unless the act was innocent or justifiable by the law of the foreign country it was immaterial to consider

what the remedy might be by the law of that country (*Machado v. Fontes*, (1897) 2 Q. B. 231). Again, it is no defence to an action for a tort committed in a foreign country that by the law of that country no action lies till the defendant has been dealt with criminally, for that is a mere matter of procedure (*Scott v. Seymour*, 1 H. & C. 219).

In *Phillips v. Eyre*, an action was brought for assault and false imprisonment against the ex-governor of Jamaica, the trespass complained of having been committed during a rebellion in that island. The defendant relied on an Act of Indemnity which the Jamaica Legislature had passed; it was held that legislation, though *ex post facto*, cured the wrongfulness of his acts and prevented the plaintiffs from recovering. In 1770, the Governor of Minorca was a gentleman named Mostyn, who apparently was of opinion that he was entitled to play the part of an absolute and irresponsible despot on his small stage. One of his subjects, however, one Fabrigas, did not coincide with him in this view, and he rendered himself so obnoxious that the Governor, after keeping him imprisoned for a week, banished him to Spain. For this arbitrary treatment Fabrigas brought an action at Westminster. Mostyn objected that, as the alleged trespass and false imprisonment had taken place in Minorca, the action could not be brought in England. But it was held that, as the cause of action was of transitory and not of a local nature, it could; and £3,000 were given as damages to Fabrigas (*Mostyn v. Fabrigas*, *ubi. sup.*). By the negligence of a pilot, compulsorily taken on board, the *Halley*, a British Steamer in Belgian waters, ran down a Norwegian vessel, the *Napoleon*. By Belgian law the Britisher was liable, but by the English law the fact that the pilot was on board, and that the collision was due to his negligence exempted her. It was held that, under those circumstances, no action lay against her in England. "It is," the Court said, "in their Lordships' opinion, alike contrary to principle and to authority, to hold that an English Court of Justice will enforce a foreign Municipal law, and will give a remedy in the shape of damages, in respect of an act which, according to its own principles, imposes no liability on the person from whom the damages are claimed." (*The Halley*, *ubi. sup.*). Actions may be brought against foreigners, for injuries committed on the high seas (*Submarine Telegraph Co. v. Dickson*, 15 C. B. N. S. 759). In an action *in personam*, brought by the owners of a British vessel against the owners of a Spanish vessel to recover damages caused to the British vessel by collision with the Spanish vessel on the high seas, the defendants pleaded that they were Spanish subjects, and that if there was any negligence on the part of those in charge of the Spanish vessel, it was negligence for which the master



and crew alone, and not the defendants, were liable according to the law of Spain. It was decided that such a defence was bad upon demurrer (*The Leon*, 6 P. D. 148). In an action between two non-resident foreigners for damages for an assault, battery, and false imprisonment, committed in Naples, the place of their domicile and birth, it was held that it was not a sufficient plea in bar, that by the law of Naples no action for private damages, for such a tort, could be maintained until after the defendant had been convicted in a public prosecution for the offence, and that the suit for that purpose was still pending and undetermined in the Courts of Naples; and that it made no difference in that respect, whether the damages sued for in the English Court were recoverable in the suit pending in the Neopolitan Court or not, all these questions having reference to the remedy only (*Seymore v. Scott*, 1 H. & C. 219). British goods on Board a British ship within the territorial waters of Muscat were seized by an officer of the British Navy under the authority of a proclamation issued by the Sultan of Muscat. Held, that the seizure having been shewn to be lawful by the law of Muscat no action could be maintained in England by the owner of the goods against the naval officer (*Carr v. Francis*, *sup.*).

*Leading cases* :—**Fabrigas v. Mostyn** ; **Phillips v. Eyre**.

**Foreign law.**—The Courts do not take judicial notice of the laws of foreign States. Such laws are proved by the oral evidence of persons having a practical acquaintance with them, and whether any particular person tendered as a witness is duly competent is a question for the Court. In general, where certain actions *ex delicto* are held transitory, and suits allowed to be maintained in a foreign forum, the right of action and the nature and extent of damage must be estimated according to the law of the place where the wrong was committed (*Story*).

With regard to foreign statutes of limitations the rule is that if the foreign law touches only the remedy or procedure for enforcing the obligation it is no bar to an action in this country (*Huber v. Steiner*, 2 Bing. N. C. 202), but if it extinguishes the right then it is a bar here (per Willes, J., in *Phillips v. Eyre*).

## CHAPTER VI.

### JUSTIFICATION OF TORTS.

THERE are certain justifications which refer only to a particular wrong, or to a small class of wrongs. These are treated in their proper places. But there are other justifications which are common to all kinds of wrongs, and to prevent the repetition of these under every wrong they are collectively treated here. Thus, in this Chapter are discussed, what Pollock calls, "the rules of immunity which limit the rules of liability. There are various conditions which when present will prevent an act from being wrongful, which in their absence would be a wrong. Under such conditions the act is said to be justified or excused. And when an act is said in general terms to be wrongful, it is assumed that no such qualifying condition exists." These justifications from civil liability for acts *prima facie* wrongful are based principally upon public grounds. They are—

- |                                           |                               |
|-------------------------------------------|-------------------------------|
| 1. Acts of State.                         | 8. Inevitable Accident.       |
| 2. Judicial Acts.                         | 9. Exercise of common Rights. |
| 3. Executive Acts.                        |                               |
| 4. Quasi-judicial Acts.                   | 10. Leave and License.        |
| 5. Parental and Quasi-Parental Authority. | 11. Works of Necessity.       |
|                                           | 12. Private Defence.          |
| 6. Authorities of Necessity.              | 13. Plaintiff a wrong-doer.   |
| 7. Damage incident to Authorised Act.     | 14. Acts causing slight harm. |

#### 1. *Acts of State.*

An act of State has been defined to be :—

(1) An act done or adopted by the prince or rulers of a foreign independent State in their political and sovereign

capacity, and within the limits of their *de facto* political sovereignty (*Pollock*).

(2) An act injurious to the person or to the property of some person who is not at the time of that act a subject of His Majesty ; which act is done by any representative of His Majesty's authority, civil or military, and is either previously sanctioned, or subsequently ratified by His Majesty (*Stephen*).

As between the Sovereign and his subjects there can be no such thing as an act of State. Courts of law are established for the express purpose of limiting public authority in its conduct towards individuals. If one British subject puts another to death or destroys his property by the express command of the King, that command is no protection to the person who executes it unless it is in itself lawful, and it is the duty of the proper Courts of justice to determine whether it is lawful or not (*Stephen*).

The doctrine of act of State is summarised as follows :—An act done by the authority, previous or subsequent, of the government of a sovereign State in the exercise of *de facto* sovereignty, is not examinable at all in the Courts of justice of any other State. So far forth as it affects persons not subject to the government in question, it is not examinable in the ordinary Courts of that State itself. If and so far as it affects the subject of the same State, it may be, and, in England, it is, examinable by the Courts in their ordinary jurisdiction (*Pollock*).

The Lieutenant-Governor of a colony is not exempt from suit in the Courts of that colony for a debt or other private cause of action (*Hill v. Bigge*, 3 Moor. P. C. 465).

*Indian law*.—The transactions of independent States between each other, are governed by other laws than those which Municipal Courts administer : such Courts have neither the means of deciding what is right, nor the power

of enforcing any decision which they may make (per Lord Kingsdown in *Secretary of State for India v. Kamachee*, 7 M. I. A. 529).

The acts of State of which Municipal Courts in India are debarred from taking cognizance, are acts done in the exercise of sovereign powers, which do not profess to be justified by Municipal law. Where an act complained of is professedly done under the sanction of Municipal law, and in the exercise of powers conferred by that law, the fact that it is done by the sovereign power, and is not an act which could possibly be done by a private individual, does not oust the jurisdiction of Civil Courts (*Secretary of State v. Hari Bhanji*, 5 Mad. 273). The legality of the Sovereign's acts towards his own subjects can be questioned in Courts (*In re Ameer Khan*, 6 B. L. R. 392; *Forester v. Secretary of State*, 12 B. L. R. 120).

Indian Courts are prohibited from exercising jurisdiction against the Governor-General of India, or the Governors of Madras, Bombay, or any Member of their Councils, in respect of anything done by them in their public capacity (21 Geo. III. c. 70, s. 1). The Governor and the Members of his Council are exempt from the jurisdiction of the High Court so far as their acts in public capacity are concerned. No suit in respect of these acts can be maintained against the Secretary of State for India in Council (*Jehangir Manekji v. Secretary of State*, 5 Bom. L. R. 30).

The control and authority exercised by the Government of India as the paramount power over the Native States is outside the jurisdiction of Municipal Courts (*Tupper. Lee Warner*).

*Indian cases.—Act of State.*—The seizure by the British Government, acting as a sovereign power, through its delegate the East India Company, of the Raj of Tanjore, with the property belonging thereto, was, with its consequences, an act of State over which a Municipal Court had no jurisdiction (*The East India Company v. Kamachee*, 7 M. I. A. 476). The status

of the King of Delhi was that of a King recognized by the British Government; and the confiscation of his territories in 1857 was held to be an act of State, and not an act done under color of any legal right of which any Municipal Court could take cognizance. In this case the plaintiff sued to recover a sum alleged to be due for principal and interest on certain mortgage bonds executed by the King. It was held that "Municipal Courts have no jurisdiction to enforce engagements between sovereigns founded on treaties." His tenure of the territories assigned him by the Government was a tenure merely *durante regno*, and no power was conferred upon him of creating incumbrances which would survive his deposition (*Saligram v. Secretary of State*, L. R. I. A. Sup. Vol. 119; 12 B. L. R. 167). By the treaty of the 31st July, 1801, made between the then Nawab in the Carnatic and the Governor in Council at Madras, the Sovereign rights of the Nawab in the Carnatic were vested in the East India Company. Held, that a resumption by the Madras Government of a Jahagir granted by former Nawab, as *Altamjah inam*, before the date of the treaty, and a re-grant by the Madras Government to another for a life estate only, was such an act of Sovereign power by the East India Company, as precluded the Supreme Court at Madras from taking cognizance of a suit by the heirs of the original grantee in respect of such resumption (*East India Company v. Syed Ally*, 7 M. I. A. 555).

Where a suit was brought against the Political Agent for prohibiting the *guru* of the plaintiff's sect from being conducted into a village and solemnizing marriages between members of the plaintiff's caste; it was held that the orders complained of had been passed by the defendant in his capacity of Political Agent, and therefore, there was no cause of action. Governor is not liable to a suit in a Court of law or equity for an action done by him in his political capacity as an act of State (*The inhabitants of Mahalingpore v. Anderson*, 7 B. L. R. 452). In a suit for the recovery of certain land of which the British Government on the annexation of the Panjab took absolute possession; it was held that the land had been seized by the Crown by its right of conquest, and therefore such seizure being an act of State it was not liable to be questioned in a Municipal Court (*Bhagwan Sing v. Secretary of State*, L. R. 2 I. A. 38).

In a case, at an auction sale for the licenses of the sale of Ganja, &c., the plaintiff was the highest bidder, such bids were recorded and he also paid the deposit due in respect of the licenses amounting to Rs. 968. Subsequently the excise authorities refused licenses to the plaintiff and failed to return the deposit made in respect thereof; it was held that the act was done by the Government in the exercise of its sovereign power, and that no suit for damage would lie (*Nobin Chunder v. Secretary of State*, 1 Cal. 11). This case was dissented from by the Madras High Court, in a case, where

the plaintiff sued to recover a sum of money which was illegally exacted from him as an import duty on salt, and it was held that the suit would lie (*Hari v. Secretary of State*, 4 Mad. 344). The plaintiff, a Municipal Commissioner, brought a suit against the Secretary of State for wrongful removal from office, and it was held that, under the Town's Improvement Act, the Governor in Council could only remove an elected Municipal Commissioner for misconduct, and the defendant not having proved misconduct, the plaintiff was entitled to damages (*Vijaya Raghava v. Secretary of State*, 7 Mad. 466).

*Not act of State.*—A Mahomedan subject of the Crown was arrested in Calcutta, taken into the mofussil, and there detained in gaol, under a warrant of the Governor-General in Council; held that such arrest and detainer were not acts of State, but matters cognizable by a Municipal Court (*In re Ameer-khan*, 6 B. L. R. 392). A village having been granted in *inam* by the Peishwa of the Deccan was, after the death of the grantee, seized by the Mamlatdar, or farmer of the revenues, for an alleged debt due to him, and retained until the treaty of Poona in 1818, when it came into the possession of the British Government. On a suit instituted by the representatives of the original grantee, for possession of the village, and payment of the arrears of revenue so sequestered, it was held that the original resumption was the wrongful act of an individual, and not an act of State (*Mills v. Modjee Pestonjee*, 2 M. I. A. 36; *The Bombay Burmah Trading Corporation v. Mahomed Ali*, 10 B. L. R. 354).

Where lands were held by a jagirdar under the Sovereign of an independent state on a *jaidad* tenure, *i. e.*, on a grant of land, together with the public revenues thereof, on the condition of keeping up a body of troops to be employed when called on in the service of the Sovereign, and on the conquest of the State by the East India Company, the jagirdar remained in the same position to the Company; it was held that the resumption of the lands by the Company, and the seizure of the arms and stores appertaining to the tenure, on the death of the jagirdar, was not an act of State, and therefore the Municipal Courts had jurisdiction to entertain a suit by the representatives of the jagirdar against the Government for the possession of the land, and for the value of the arms and stores (*Forrester v. Secretary of State* L. R. I. A. Sup. Vol. 10, P. R. 13 of 1867; *Sujan Singh v. Secretary of State*, P. R. 48 of 1868). The plaintiff brought a suit at Toungoo in British Burma to recover possession of certain timber, which he alleged the defendants had wrongfully and in collusion with the Burmese Governor of Nigham, taken out of his possession in foreign territory and removed to Toungoo. The defendants stated that they had acquired the timber from the Governor of Nigham in terms of an agreement between them and the Burmese Government. It appeared that the Governor of Nigham had confiscated the

plaintiff's timber in contravention of a royal mandate. After the institution of the suit, the defendants removed the timber from Toungoo to Rangoon. Held, that a British Municipal Court might enquire into the character of the act of the Governor of Nigham, and was not bound to accept it as an act of State (*Bombay Burmah Trading Corporation v. Mahomed Ali*, 10 B. L. R. 345).

**Ratification.**—Plaintiff sued defendant, a naval captain, for burning plaintiff's barracoons and releasing slaves in them; it was held that the defendant was not liable, having acted in the capacity of the Crown, and the Crown having accepted his acts as its own. Ratification of the defendant's Acts by the Ministers of State was equivalent to a prior command, and rendered it an act of State, for which the Crown was alone responsible (*Buron v. Denman*, 2 Ex. Rep. 167).

*Indian case.*—A sequestration by the officers of the British Government of the private property of the Angria of Kolaba, a native independent Sovereign, though made contrary to the express orders of the Court of Directors originally given, would not be liable to question in a Municipal Court if subsequently ratified, but *aliter* where there is no such ratification (*Zuleef Alli v. Yeshwadabai*, 9 Bom. H. C. 314).

## 2. *Judicial Acts.*

**Judge.**—No action lies for acts done or words spoken by a Judge in the exercise of his judicial office, although his motive is malicious and the acts or words are not done or spoken in the honest exercise of his office (per Lord Esher, M. R., in *Anderson v. Gorrie*, (1895) 1 Q. B. 671; *Scott v. Stanfield*, L. R. 3 Ex. 222). The public are deeply interested in this rule, which indeed exists for their benefit, and was established in order to secure the independence of the Judges, and prevent their being harassed by vexatious actions (per Crompton, J., in *Fray v. Blackburn*, 3 B. & S. 578). The law requires courage in a Judge, and therefore provides security for the support of that courage (per North, C. J., in *Barnardiston v. Some*, 6 How. St. Tr. 1096). Being free from actions, he may be free in thought and independent in judgment.

Under English law in the case of a *superior* Court it is

presumed that everything is within its jurisdiction, and plaintiff must prove the contrary; but in the case of an *inferior* Court the Judge must show that at the time of the alleged wrong-doing some matter was before him in which he had jurisdiction, and the act complained of must be of a kind which he had power to do as Judge in that matter (*Holden v. Smith*, 14 Q. B. D. 841). But (1) where the Court has no jurisdiction over the cause, or (2) where it has exceeded its jurisdiction; knowledge of the absence or excess of jurisdiction is attributed to the Judge, and he becomes liable.

*Indian law.*—"No Judge, Magistrate, Justice of the Peace, Collector, or other person acting judicially, shall be liable to be sued in any Court for any act done, or ordered to be done, by him in the discharge of his judicial functions, whether or not within the limits of his jurisdiction, provided that, he at the time, in good faith, believed himself to have jurisdiction to do or order the act complained of; and no officer of any Court or other person bound to execute the lawful warrants or orders of any such Judge, Magistrate, Justice of the Peace, Collector, or other person acting judicially, shall be liable to be sued in any Civil Court for the execution of any warrant or order which he would be bound to execute if within the jurisdiction of the person issuing the same" (Act XVIII of 1850, s. 1).

This Act protects judicial officers acting judicially, and also officers acting under their orders. It does not protect judicial officers from being sued in a Civil Court except in respect of acts done by them in good faith in the discharge of their judicial functions (*Venkat v. Armstrong*, 3 Bom. H. C. A. C. 47; *Parankusam v. Stuart*, 2 M. H. C. 396; *Ragunanda Raw v. Nathumani*, 6 M. H. C. 423; *Hari v. Janardhan*, P. J. No. 92 of 1873); but not ministerial (*Chunder Narain v. Brijo Bullub*, 14 B. L. R. 254; 21 W. R. 391).



Where an act done or ordered to be done by a judicial officer in the discharge of his judicial duties is *within* the limits of his jurisdiction, he is protected, whether or not he has discharged those duties erroneously, irregularly, or even illegally, or without believing in good faith that he had jurisdiction to do the act complained of. Where the act done or ordered to be done in the discharge of judicial duties is *without* the limits of the officer's jurisdiction, he is protected if, at the time of doing or ordering it, he in good faith believed himself to have jurisdiction to do or order it (*Teyen v. Ramlal*, 12 All. 115; *Meghraj v. Zakir Husain*, 1 All. 280; *Collector of Sea Customs v. Punniar*, 1 Mad. 89; *Sinclair v. Broughton*, 9 Cal. 341, L. R. 9 I. A. 152; *Hali-moozzumah v. Muni. Commis. of Hooghly*, 13 W. R. 340; *Seshayi-Yangar v. Rughunatha*, 5 M. H. C. 345; *Collector of Hooghly v. Taraknath*, 16 W. R. 63, 7 B. L. R. A. C. 449). The word 'jurisdiction' means authority or power to act in a matter, and not authority or power to do an act in a particular manner or form (12 All. 115).

If a Magistrate fail to act reasonably, carefully, and circumspectly in the exercise of his duties, and if, by reason of such failure, he do that for which he has not any legal authority, he cannot be permitted to say that at the time he thus acted, he, in good faith, believed him to have jurisdiction to do the act complained of (per Westropp, J., in *Vinayak v. Bai Itcha*, 3 Bom. H. C. A. C. 46; *Vithoba v. Corfield*, 3 Bom. H. C. App. 1; *Queen v. Shapon*, 11 W. R. Cr. 19). Wilful abuse of his authority by a Judge—that is, wilfully acting beyond his jurisdiction—is a good cause of action by the party who is injured (*Amiappa v. Mahomed*, 2 M. H. C. 443; *Reg. v. Dalsukram*, 2 Bom. H. C. 384).

A plaint to maintain an action against a judicial officer must not only aver that the officer had no jurisdiction, but also that he had no reasonable and probable

cause for supposing that he had jurisdiction (*Pralhad v. Watt*, 10 Bom. H. C. 346; *Calder v. Halket*, 2 M. I. A. 293).

**Members of naval and military Court Martials and Courts of inquiry** constituted according to military law enjoy the same immunity, as Judges.

**Arbitrators**, whom the parties by consent have chosen to be their Judges, shall never be arraigned more than any other Judges (per Lord Holt, C. J., in *Morris v. Reynolds*, 2 Ld. Raym. 857). For, if it should be allowed to make arbitrators, defendants, and give them trouble to defend their judgments and set forth the particular reasons upon which they founded their award, it would introduce very great inconvenience, and be a discouragement to any person to undertake a reference (*Addison*). Arbitrators, if acting honestly, will not be liable for errors in judgment, or for negligence in the discharge of the duties intrusted to them; but they are liable for fraud or collusion (*Wills v. Maccarmick*, 2 Wils. 148; *Tozer v. Child*, 7 El. & Bl. 383).

**Juryman.**—An action will not lie against a juryman for a wrong verdict.

**Coroner.**—A coroner is a judicial officer. No action will lie against him for any matter done by him in the exercise of his judicial functions (*Garnett v. Ferrand*, 6 B. & C. 611).

### 3. *Executive Acts.*

No action will lie in respect of acts done in the course of official duty (*Sutton v. Johnstone*, 1 T. R. 493).

No action lies against a public officer for the regular enforcement of any sentence or process of any law within the jurisdiction of the Court under whose authority he acts, but he must act in a manner in itself reasonable and in execution of an apparently regular warrant or order, which

on the face of it, he is bound to obey. When the Court issuing process has no jurisdiction, officers are liable at Common law (*Clarke v. Woods*, 2 Ex. 395). As to mere mistake of fact, such as arresting the body or taking the goods of the wrong person, an officer of the law is not excused in such a case. He must lay hands on the right person or property at his peril; the only exception being on the principle of estoppel, where he is misled by the party's own act (*Pollock*).

Acts of naval and military officers in the execution of their duty fall under this head (*Keightley v. Bell*, 4 F. & F. 790; *Marks v. Frogley*, (1898) 1 Q. B. 900).

Persons acting under other public authorities are also protected.

No action will lie against a minister of the Crown in his character as minister. If he commit a trespass in regard to the person or property of another, he may be sued as a private person (*Rakigh v. Goschen*, 14 T. L. R. 36).

Police officers are protected in the performance of their executive duties by express legislative enactments in India (Act V of 1861, s. 43; Bombay Act IV of 1890, s. 80; Bombay Act IV of 1902, s. 140; Madras Act XXIV of 1859).

#### 4. *Quasi-judicial Acts.*

These are acts of universities, colleges, committees, inns of court, &c. Persons enjoying quasi-judicial powers are protected from civil liability if they observe the rules of natural justice, and the particular statutory or conventional rules, which may prescribe their course of action. The rules of natural justice are that a man cannot be removed from office or membership unless the person exercising such powers have (1) acted in good faith, (2) given

him a fair and sufficient notice of his offence, and (3) given him an opportunity of defending himself.

If these conditions are satisfied a Court will not interfere, even if it thinks the decision to be wrong (*Dawkins v. Antroous*, 17 Ch. D. 615; *Allbutt v. Medical Council*, 23 Q. B. D. 400; *Partridge v. Medical Council*, 25 Q. B. D. 90; *Baird v. Wells*, 44 Ch. D. 661; *Fisher v. Jackson*, (1891) 2 Ch. 84). If not, the act complained of will be declared void, and the person affected by it maintained in his rights until the matter has been properly and regularly dealt with (*Fisher v. Keane*, 11 Ch. D. 353).

When a Statute gives absolute discretionary powers there is no necessity to show proceedings in the nature of judicial proceedings, and a man can be removed from office or the like without showing any cause at all.

In *Nagar v. Municipality of Dhandhuka* (12 Bom. 490) West, J., said: "Public authorities even acting within the defined limits of their powers must not conduct themselves arbitrarily or tyrannically (*Leader v. Moxon*, 2 W. Bl. 924; *Sutton v. Clarke*, 6 Taunt. 43). Public functionaries, acting within the limits prescribed by the Statute which gives them authority, are not subject to a suit for thus discharging their duties according to their judgment. A public body must keep within its powers, and must use them considerately (*Geddis v. Proprietors of Bann Reservoir*, 3 App. Cas. 455). 'The public bodies are to be the judges, subject to this, that if they are manifestly abusing their powers..... the Court will say, it is not a fair and honest judgment, and will not allow it' (per Jessel, M. R., in *Duke of Bedford v. Dawson*, L. R. 20 Eq. 358)."

### 5. Parental and quasi-parental authority.

Parents and persons in *loco parentis* are not liable for exercising summary force and restraint, if acting *bona-fide*

and in a reasonable and moderate manner. The same rule applies to custodians of lunatics. In case of a drunken man, or one deprived of self-control by a fit or other accident, the use of moderate restraint, as well for his own benefit as to prevent him from doing mischief to others, may in the same way be justified (*Pollock*).

To an action of trespass for an assault and battery, it is a good plea to plead that the person assaulted was the son of the defendant, and was an infant as defined by the Statute, (still domiciled under paternal roof, under the care and control of the defendant, that he behaved saucily and contumaciously to the defendant, and refused to obey his lawful commands, whereupon the defendant *moderately and in a reasonable manner* chastised his said son (*Winterburn v. Brooks*, 2 C. & K. 16); or that the plaintiff was the apprentice of the defendant and conducted himself improperly and saucily, wherefore the defendant *moderately* chastised him, as he had a right to do (*Penn v. Ward*, 2 C. M. & R. 338); or that the defendant was the head-master of a school or college of which the plaintiff was a pupil (*Fitzgerald v. Northcote*, 4 F. & F. 656).

#### 6. *Authorities of necessity.*

The master of a merchant ship has by reason of necessity the right of using force to preserve order and discipline for the safety of the vessel and the persons and property on board. Thus, if he has reasonable cause to believe that any sailor or passenger is about to raise a mutiny, he may arrest and confine him. In cases of extreme danger he may inflict punishment without any form of enquiry (*Pollock*).

It is a good defence to plead that the plaintiff was a passenger by the ship of which the defendant was captain, and that by reason of the plaintiff's conduct it became *necessary* to the preservation of the discipline or safety of the ship to imprison him (*Aldworth v. Stewart*, 4 F. & F. 957).

#### 7. *Damage incident to authorized acts.*

An action will not lie on behalf of a person who may sustain an injury from the execution of powers and authorities given by an Act of Legislature, these powers being

exercised with judgment and caution (per Lord Truro, in *L. & N. W. Ry. v. Bradly*, 3 M. & G. 341; *Caledonian Ry. v. Ogilvy*, 2 Mac. Sc. App. 246; *Foncar Bros. v. Rangoon Municipal Committee*, 3 Burma L. R. 12; *Bhogilal v. Ahmedabad Municipality*, 3 Bom. L. R. 415; *Municipal Com. of Delhi v. Har Parshad*, P. R. 103 of 1892). "If the thing done is within the Statute, it is clear that no compensation can be afforded for any damage sustained thereby, except so far as the Statute itself has provided it; and this is clear on the legal presumption that the act creating the damage, being within the Statute, must be a lawful act" (*Duncan v. Findlater*, 6 Cl. & F. 908). If no compensation is given, that affords a reason, though not a conclusive one, for thinking that the intention of the legislature was, not that the thing should be done at all events, but only that it should be done, if it could be done without injury to others (*Hammersmith Ry. v. Brand*, L. R. 4 H. L. 171). But if the statutory powers are exceeded, or are not strictly pursued, or the things authorized to be done are carelessly or negligently done, an action is maintainable for damages (*Addison*). If damage could have been prevented by the reasonable exercise of the powers conferred, an action can be maintained (*H. H. the Gaekwar v. Ghandhi Katcharabhai*, 2 Bom. L. R. 357; *Bhogilal v. Ahmedabad Municipality*, 3 Bom. L. R. 415).

There is a distinction between cases where the Legislature "directs that a thing shall at all events be done" and those where it only gives a discretionary power with choice of times and places. Where a discretion is given it must be exercised with regard to the common right of others.

A Statute may authorize an act in *three* different ways:—

(1). The Statute may authorize a nuisance.

(2). It may authorize certain works, provided they can be done without causing a nuisance, or

(3). It may authorize works to be carried out, if possible, without a nuisance, but may authorize the nuisance itself, if necessary, in the last resort (per Bowen, L. J., in *Truman v. L. B. & S. C. Ry.*, 29 Ch. D. 108). And even when a particular thing is required to be done the burden of proof is on the person who has to do it to show that it cannot be done without creating a nuisance.

As regards statutory powers in general, the Statute will be construed strictly, and, in cases of doubt, in favour of the subject, and against the persons invested with powers. When by a Statute, a *particular power* is given to do a particular act in a particular manner, the procedure laid down must be adhered to most rigidly, otherwise the protection of the Statute cannot be claimed (*Sinclair v. Broughton*, L. R. 9 I. A. 172). When a Statute gives a *general power*, the *bona-fide* and prudent exercise of that power can be called in question in Civil Courts, and the person exercising such general power must act accordingly (*Brundabun v. Muni. Commissioners of Serampore*, 19 W. R. 309).

A person seeking the protection of an Act cannot claim that his conduct has any relation to the "execution of the Act," if he knowingly and intentionally acts in contravention of its provisions (*Ranchordas v. Muni. Commissioner of Bombay*, 3 Bom. L. R. 158; 25 Bom. 387).

Where the legislature has authorized a railway company to lay down a railway alongside a public highway, it must be presumed to have contemplated the possibility that the railway would be a nuisance to persons using the highway, and that such persons must submit to the inconvenience necessarily resulting from the working of the railway (*R. v. Pease*, 4 B. & Ad. 42). A railway company was held not liable for damage caused by sparks from its engines setting fire to the dried plantation of the plaintiff, as it was authorized to use such engines, and had adopted every precaution which

science could suggest to prevent injury (*Vaughan v. Taff Vale Ry.*, 5 H. & N. 679). But Bramwell, L. J., in *Powell v. Fall* (5 Q. B. D. 597) remarked that in his opinion *R. v. Pease*, and *Vaughan v. Taff Vale Ry.*, were wrongly decided. In *Powell v. Fall* the defendant was possessed of a steam-traction-engine, and while it was being driven by the defendant's servants along a highway, some sparks escaping from it set fire to a stack of hay of the plaintiffs standing on a neighbouring farm. There was no negligence in the construction or management of the engine, but it was held that the defendant was liable, on the ground that the engine was a dangerous machine, (and, therefore, within the doctrine of *Fletcher v. Rylands*, L. R. 3 H. L. 330) and that the locomotive Act did not restrict the Common law liability. In an action by occupiers of houses near a company's station for noises and annoyance caused by cattle and drovers on the company's land, it was held that the appellant company was not liable (*L. B. & S. C. Ry. v. Truman*, 11 App. Cas. 45).

A District Board was held not entitled to set up a Statute authorizing a small-pox hospital as an answer to an action, or to prevent an injunction issuing to restrain the Board from establishing a hospital *where the establishment of such hospital would be a nuisance*. They must find a different site where they would not be creating a nuisance (*Metropolitan Asylum District Board v. Hill*, 6 App. Cas. 193). A gas company was authorized to have its pipes laid under certain streets which were to be repaired by the vestry, and the vestry used steam-rollers of such weight that the company's pipes were broken or injured by pressure, it was held that, even if the use of such rollers was in itself the best way of repairing the streets, the act of the vestry was wrongful (*Gas Light &c. Co. v. Vestry of St. Mary Abbots*, 54 L. J. Q. B. 414).

*Indian cases.*—A railway company cannot build workshops so situated, to a neighbour (*Raj Mohun Bose v. E. I. Ry.*, 10 B. L. R. 241). But where the defendant company was authorized to run locomotive engines, the company was held not liable for damage occasioned by a fire caused by a spark from one of the engines, without proof of negligence (*Halford v. East Indian Ry.*, 14 B. L. R. 1). Where the legislature sanctions and authorizes a railway company the use of a particular thing and it is used for that purpose, the sanction carries with it the consequence that if damage result from it the company is not responsible (*H. H. The Gaekwar v. Ghandhi Katchrabhai*, 2 Bom. L. R. 357).

### 8. *Inevitable accident.*

An injury inflicted by a person upon another may be justified upon the ground of inevitable accident. The word 'accident' has been defined as "such an unfor-



seen event, misfortune, loss, act, or omission, as is not the result of any negligence or misconduct in the party" applying for relief (*Story*). An 'inevitable accident' is an accident not avoidable by any such precaution as a reasonable man could be expected to take. It is an accident such as the defendant could not have avoided by use of the kind and degree of care necessary to the exigency, and in the circumstances in which he was placed (*Pollock*). All causes of inevitable accident may be divided into two classes: (1) those which are occasioned by the elementary forces of nature, unconnected with the agency of man or other cause; and (2) those which have their origin, either in the whole or in part, in the agency of man, whether in acts of commission or omission, of non-feasance or of misfeasance, or in any other cause independent of the agency of natural forces. The term "act of God" is applicable to the former class (*Nugent v. Smith*, L. R. 1 C. P. D. 423) and it is therefore not synonymous with that of 'inevitable accident' (*Forward v. Pittard*, 1 T. L. R. 27).

The American Courts have laid down the following principles in cases falling under this head. "No one is responsible for injuries resulting from unavoidable accident, whilst engaged in a *lawful* business. The measure of care against accident which one must take, to avoid responsibility, is that which a person of ordinary prudence and caution would use if his own interests were to be affected and the whole risk were his own." (*The Nitro-Glycerine case*, 15 Wall. 524). "If in the prosecution of a *lawful* act, a casualty purely accidental arises, no action can be supported for an injury arising therefrom" (*Brown v. Kendall*, 6 Cush. 292). But if at the time of the accident the person was doing an *unlawful* act, *e.g.*, committing an assault, he would be liable.

In England, until the beginning of this century, it was

supposed that inevitable accident formed no excuse when the immediate result of an act was complained of. But now it has been definitely settled that inevitable accident forms a good defence to an action (*Holmes v. Mather*, L. R. 10 Ex. 261; *Stanley v. Powell*, (1891) 1 Q. B. 86). In order to constitute an inevitable accident it is necessary that the accident should not have been capable of being prevented by ordinary skill and diligence—not extraordinary skill or extraordinary diligence—by that degree of diligence and skill which is generally to be found in persons who properly discharge their duty (*The Thomas Powell v. The Cuba*, 14 L. T. 603; *The Calcutta*, 21 L. T. 763; *The Marpesia*, 8 Moo. P. C. 468; 26 L. T. 33).

The defendants, a firm of carriers, received a wooden case to be carried to its destination and its contents were not known or communicated. On an intermediate station it was found that the contents were leaking. The case was therefore taken to the defendants' offices, which they rented from the plaintiff, and a servant of the defendants proceeded to open the case for examination but the nitro-glycerine exploded, all the persons present were killed, much property destroyed, and the building was damaged. An action was brought by the landlord for damage suffered by parts of the building let to other tenants as well as to the defendants. The defendants admitted their liability as for waste as to the premises occupied by them, but disputed it as to the rest of the building. It was held that in the first place the defendants were not bound to know, in the absence of reasonable grounds of suspicion, the contents of packages offered them for carriage: and next that, without such knowledge in fact, and without negligence, they were not liable for damages caused by the accident (*Nitro-Glycerine case*, *sup.*). The plaintiff's and the defendant's dogs were fighting: the defendant was beating them in order to separate them, and the plaintiff was looking on. But in doing so he accidentally hit the plaintiff in the eye causing him a severe injury. In an action brought by the plaintiff, it was held that the act of the defendant in itself was a lawful and proper act which he might do by proper and safe means; and that if, in doing this act, he accidentally hit the plaintiff in the eye and wounded him, it was the result of pure accident, and therefore no action would lie (*Brown v. Kendall*, *sup.*).

The defendant was out with a pair of horses driven by his groom, and

the horses ran away and the groom, being unable to stop them, guided them as best as he could: at last he failed to get them clear round a corner, and they knocked down the plaintiff: it was held that the defendant was not liable because "for the convenience of mankind in carrying on the affairs of life, people as they go along roads must expect, or put up with such mischiefs as reasonable care on the part of others cannot avoid" (*Holmes v. Mather, sup.*). Where a pellet glanced from a bough and wounded the plaintiff's eye, it was held that where negligence was negatived an action did not lie for injury resulting by accident from another's lawful act (*Stanley v. Powell, sup.*). Where an ordinarily quiet horse was being driven along a high road by the defendant, and suddenly bolted and injured the plaintiff's horse, it was held that the defendant was not liable, because the injury to the plaintiff's horse was not attributable to any voluntary unauthorised act or omission of his (*Wakeman v. Robinson*, 1 Bing. 230).

*Indian case.*—A servant broke a lamp belonging to his master. There was no special contract between the master and servant as to liability for breakages. Held, that the servant was not liable. "A servant, in the performance of his duties, is bound to exercise reasonable care and diligence, such as an ordinarily careful person would use in the management of his own affairs, and where loss happens from mere accident, such as will occur at any time in ordinary life, he is not liable to make it good" (per Benton, J., in *Steiert v. Kamna*, P. R., 3 of 1891).

### 9. *Exercise of common rights.*

The exercise of ordinary rights for a lawful purpose and in a lawful manner is no wrong even if it causes damage. It is in reference to such cases that we meet with the phrase *damnum sine injuria*. Fair competition is in itself no ground of action, whatever damage it may cause (*Gloucester Grammar School*, 11 Hen. IV, 47). Underselling is not a wrong, though the seller may sell some article at unremunerative prices to attract customers, nor is it a wrong to offer advantages to customers who will deal with a trading company to the exclusion of its rival (*Mogul Steamship Co. v. McGregor*, (1892) A. C. 25).

The removal of soil in a man's own land, though it is the means, by process of a natural percolation, of dry-

ing up his neighbour's spring or well, does not constitute the invasion of a legal right, and will not sustain an action. And, further, it makes no difference whether the damage arise by the water percolating away, so that it ceases to flow along channels through which it previously found its way to the spring or well, or whether having found its way to the spring or well, it ceases to be retained there (*Ballacorkish Mining Co. v. Harrison*, L. R. 5 P. C. 61). Everyone may *innocently* enjoy his own property as he will. And the right is the same whatever one's motive may be, whether malicious or otherwise. "No use of property which would be legal if due to a proper motive can become illegal because it is prompted by a motive which is improper or even malicious" (per Lord Watson in *Corpo. of Bradford v. Pickles* (1895), A. C. 587).

Plaintiff's mill was worked by a river, supplied by subterranean water produced by the rain fall over a large district; defendant sank a well on his own land, and pumped up water for the supply of the inhabitants of the district, thereby preventing an enormous quantity of water from ever reaching the river or the mill. It was held that plaintiff had no right of action against defendant. 'It makes no difference if the well or water course, whose supply is cut off or diminished, is ancient, and also it matters not whether the operations carried on by the owner of the surface are or are not for any purpose connected with the use of the land itself' (*Chasemore v. Richards*, 7 H. L. 349). The defendant had sunk a deep pit in his own land for mining purposes and kept it dry by pumping in the usual way, with the result of drying up a well which belonged to the plaintiff and was used by him to supply his cotton mill; it was held that no action lay. 'The person who owns the surface may dig therein, and apply all that is there found to his own purposes, at his free will and pleasure, and if in the exercise of such right he intercepts or drains off the water collected from underground springs in his neighbour's well, this inconvenience to his neighbour falls within the description of *damnum absque injuria* which cannot become the ground of an action' (*Acton v. Blundell*, 12 M. & W. 353). Where the defendant intended to divert underground water from springs that supplied the plaintiff corporation's works, in order to drive the corporation to buy him off; it was held that the defendant's conduct was unneighbourly but was not malicious, the

object was not harm to plaintiff but gain to defendant (*Corporation of Bradford v. Pickles*, *sup.*). In this case the *dictum* in *Chasemore v. Richards* was approved and the doctrine "*animus vicini nocendi*" denied.

### 10. *Leave and License—Volenti non fit injuria.*

A plea to an action of tort that the act complained of was done with the consent of the plaintiff is always a good defence, provided the act itself is not a crime (*Edwick v. Hawkes*, 18 Ch. D. 199), upon the principle *volenti non fit injuria* (that which a person assents to is not esteemed in law an injury). The perfectly sound principle underlying this maxim is daily illustrated in common life. It protects the surgeon who amputates a limb; the football player, boxer, or fencer, so long as they play fairly according to the rules of the game; and it prevents a person who chooses to pay a debt barred by the Statute of Limitations, or not enforceable by reason of infancy, from getting, his money back (*Bize v. Dickson*, 1 T. R. 286, 287). It must also be received with this reservation, that no consent—no leave or license—can legalise an un-lawful act, *e. g.*, fighting with naked fists, a kicking match, a duel with sharp swords.

Thus wilful hurt is not excused by consent or assent if it has no reasonable object, or is necessarily dangerous and likely to cause bodily harm. A license obtained by fraud is of no effect.

A man cannot complain of harm to the chances of which he has exposed himself with knowledge and of his free will. Where the plaintiff has voluntarily put himself in the way of risk, the defendant is not bound to disprove negligence. There is no duty of warning. The doctrine of voluntary exposure to risk has no application between parties on an equal footing of rights of whom one does not go out of his way more than the other. If the injuries

arose out of a risk in respect of which the defendant owed no duty to the plaintiff, or in respect of which the defendant fulfilled such duty as he owed, the action fails, whether or not the plaintiff ran the risk voluntarily, since the defendant has done him no wrong (*Membery v. G. W. Ry.*, 14 App. Cas. 192).

A trespasser with notice that spring guns were set on the land he trespassed on could not recover for injuries caused by such guns, on the ground that he voluntarily exposed himself to the mischief complained of (*Ilott v. Wilkins*, 3 B. & Ald., 304). But a trespasser wounded in similar circumstances, but without such notice, was held entitled to recover (*Bird v. Holbrook*, 4 Bing. 628).

The obscurity of the maxim lies in the word *volenti*, the extent of the consent given. *Scienti* is not *volenti*. There are degrees of knowledge and even full knowledge that an act is dangerous does not necessarily render the act, if done, a voluntary act (per Bowen, L. J., in *Thomas v. Quartermain*, 18 Q. B. D. 696). For instance, if by a person's misconduct towards another, the latter is placed in a situation which only leaves him a choice between perilous courses, the former is liable for the consequences of whichever course the latter takes; the latter's knowledge of the risk run by his taking that course is immaterial.

### 11. *Works of necessity.*

This exception is based on the maxim "*Salus populi suprema lex*" (the welfare of the people is the supreme law) a maxim founded on the implied assent on the part of every member of society, that his own individual welfare shall, in cases of necessity, yield to that of the community; and that his property, liberty, and life shall, under certain circumstances, be placed in jeopardy or even sacrificed for the public good. There are many cases in which indivi-

duals sustain an injury for which the law gives no action ; as, where private houses are pulled down, or bulwarks raised on private property, for the preservation and defence of the kingdom against the King's enemies (per Buller, J., in *Plate Glass Co. v. Meredith*, 4 T. L. R. 797).

Acts done of necessity to avoid a greater harm are not actionable, *e.g.*, pulling down houses to stop a fire, casting goods overboard to save a ship or the lives of those on board. But, the private interests of the individual is never to be sacrificed to a greater extent than is necessary to secure a public object of adequate importance (*Simpson v. Lord Howden*, 1 Keen 595).

## 12. *Private defence.*

Every person has a right to defend his own person, property, or possession. This may even be done for a wife or husband, a parent or child, a master or servant. The force employed must not be out of proportion to the *apparent* urgency of the occasion. The person acting on the defensive is entitled to use as much force as he reasonably believes to be necessary. The test is whether the party's act was such as he might reasonably, in the circumstances, think necessary for the prevention of harm which he was not bound to suffer.

Injuries received by an innocent third person from an act done in self-defence must be dealt with as accidental harm caused from a lawful act.

A man cannot justify for the protection of his own property the doing of an act which causes damage to a neighbour's property (*Whalley v. L. & Y. Ry.*, 13 Q. B. D. 131).

The plaintiff and defendant were both members of a cricket club ; a match was going on and the plaintiff interfered with the game, and persisted in remaining on that part of the ground reserved to the

players, of whom the defendant was one. The latter had him removed forcibly, and in an action of assault justified, among other pleas, on the ground that he was defending the possession of the two elevens engaged in the game, it was held that such a plea could not be supported (*Holmes v. Begge*, 1 E. & B. 782).

### 13. *Plaintiff a wrongdoer.*

A plaintiff is not disabled from recovering by reason of being himself a wrong-doer, unless some unlawful act or conduct on his own part is connected with the harm suffered by him as part of the same transaction. A trespasser is liable to an action for the injury which he does; but he does not forfeit his right of action for an injury sustained (*Barnes v. Ward*, 9 C. B. 392; *Bird v. Holbrook*, 4 Bing. 625—*Pollock*).

A person, who having occasion to come to the house of another, strays from the ordinary approaches to the house, and trespasses upon the adjoining land, where there is no path, has no remedy for any injury which he may sustain from falling into unguarded wells or pits, as the injury is the result of his own carelessness or misconduct (*Bolch v. Smith*, 7 H. & N. 736).

### 14. *Acts causing slight harm.*

Courts of justice generally do not take trifling and immaterial matters into account, except under peculiar circumstances, such as the trial of a right, or where personal character is involved (*Broom*, 115). Except in the case of acts which if continued or repeated would tend to establish an adverse claim of right, nothing is a wrong of which under all the circumstances a person of ordinary sense and temper would not complain; but acts which separately would not be wrongs may amount to a wrong by a repetition or combination (I. C. W., s. 26).



A walks across B's field without B's leave, doing no damage. A has wronged B, because the act, if repeated, would tend to establish a claim to a right of way over B's land (*ill.*). A casts and draws a net in water where B has the exclusive right of fishing. Whether any fish are caught or not, A has wronged B, because the act, if repeated, would tend to establish or claim a right to fish in that water (*Holford v. Bailey*, 18 L. J. Q. B. 109).

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## CHAPTER VII.

### DISCHARGE OF TORTS.

WHERE there is a vested right of action for a tort it may be discharged by—

- |                              |                            |
|------------------------------|----------------------------|
| 1. The death of the parties. | 5. Acquiescence.           |
| 2. Waiver.                   | 6. Judgment recovered.     |
| 3. Accord and satisfaction.  | 7. Bankruptcy.             |
| 4. Release.                  | 8. Statutes of Limitation. |

#### 1. *Death of one of the parties.*

It was a maxim of the Common law that a personal action did not survive on the death, either of the person who did, or of the person who sustained, the wrong—*actio personalis moritur cum persona* (a personal right of action dies with the person); and although this maxim has been modified in many instances by Statutes, yet, in the absence of statutory provision to the contrary, it still prevails, unless the estate is affected by the tort (*Twycross v. Grant*, 4 C. P. D. 40; *Ashby v. Taylor*, 48 L. J. Ch. 406).

#### (1). DEATH OF THE PERSON INJURED.

In consequence of the maxim *actio personalis moritur cum persona*, executors or administrators cannot maintain an action for an assault upon, or false imprisonment of, their deceased testator or intestate, or for a libel upon him, or for any act of negligence or violence not ending in death. Formerly, when damage done to real property accrued wholly in the life-time of the testator, the heir-at-law, devisee, or remainderman, could not sue in respect of it; neither could the personal representative in consequence of this old maxim of the Common law. Thus, if

trespassers entered upon the land and cut down trees, or gathered, carried away, and sold growing crops and fruit, or set fire to buildings, and caused them to be utterly consumed, the heir could not sue, because the damage was sustained in the life-time of the ancestor, and the personal representatives could not recover the damages that had been sustained, because they were personal to the deceased, and the remedy died with him (*Adam v. Bristol*, 2 Ad. & E. 389; *Raymond v. Fitch*, 2 C. M. & R. 597—*Addison*). Actions for breach of promise of marriage could be maintained by the representatives of the injured party, only if special damage was alleged and proved (*Chamberlain v. Williamson*, 2 M. & S. 408; *Finlay v. Chirney*, 20 Q. B. D. 494).

**Exceptions**—Following are the statutory exceptions engrafted on the above maxim:—

1. Where an injury to goods and chattles of the deceased has been committed, the right of action survives to his executors and administrators (4 Edw. III. c. 7; 25 Edw. III. c. 5).

2. Where any injury to the real estate of the deceased has been committed in his lifetime for which an action might have been maintained by him, his executors or administrators may bring an action, if (1) such injury has been committed within six months before his death, and (2) such action is brought within one year after his death (3 & 4 Will. IV. c. 42, s. 2).

3. Where a person's death is caused by the wrongful act, neglect, or default of another, and the injured person, if he had lived, could have maintained an action, and recovered damages in respect thereof, the person who would have been liable in such case shall be liable to an action for damages, notwithstanding the death of the injured person, and although the death shall have been

caused under such circumstances as amount in law to felony (Lord Campbell's Act, 9 & 10 Vic. c. 93, s. 1).

Such action shall be for the benefit of the wife, husband, parent, and child of the person whose death shall have been so caused, and shall be brought by and in the name of the executor or administrator of the person deceased (s. 2). 'Parent' includes grandfather, grandmother, stepfather, stepmother: and 'child' includes grandchild, a stepchild, a child *en ventre sa mere* (*George and Richard*, 3 A. & E. 466), but not an illegitimate child (*Dickinson v. N. E. Ry.*, 2 H. & C. 735).

The action must be brought within one year after death and only one action can be brought for the same cause of complaint (s. 4).

Where there is no executor or administrator of the person whose death has been caused, or where no action is brought by him within six months, all or any of the persons for whose benefit the right of action is given by Lord Campbell's Act may sue in their own names (27 & 28 Vic. c. 95).

The parties for whose benefit this right exists should show some appreciable *pecuniary* loss to themselves owing to the death of the deceased. No action can be maintained for nominal damages (*Duckworth v. Johnson*, 4 H. & N. 653); or bodily hurt and suffering of the deceased; or their own affliction (*Blake v. Midland Ry.*, 18 Q. B. D. 93); or funeral and mourning expenses (*Dalton v. S. E. Ry.*, 4 C. B. N. S. 296); or if the deceased had accepted satisfaction for his injuries in his lifetime; or if the loss arises not from the relationship, but through some contract, with the deceased. It is not at all necessary to show a legal right to receive benefit to the deceased (*Franklin v. S. E. Ry.*, 3 H. & N. 211). Lord Campbell's Act applies to the case of a foreigner whose death is caused by an

accident on the high seas, at all events where the defendant is an Englishman (*Davidson v. Hull*, (1901) 2 K. B. 606).

4. Where a workman dies of injuries sustained whilst in his employer's service through any of the causes mentioned in the Employer's Liability Act, his legal personal representatives, and any persons entitled in case of death, shall have the same right of compensation and remedies against the employer, as if the workman had not been a workman of, nor in the service of, the employer, nor engaged in his work (43 & 44 Vic. c. 42, s. 1).

5. By the Workmen's Compensation Act, 1897, any reference to a workman who has been injured shall, where the workman is dead, include a reference to his legal personal representative or to his dependants or other person to whom compensation is payable (60 & 61 Vic. c. 37, s. 7 (2)).

*Indian law.*—By the Indian Succession Act (X of 1865, s. 268) and the Probate and Administration Act (V of 1881, s. 89) no causes of action for defamation, assault, as defined in the Indian Penal Code, or other personal injuries not causing the death of the party; nor actions in cases where, after the death of the party, the relief sought could not be enjoyed, or granting it would be nugatory; survive to and against his executors or administrators.

**Exceptions**—(1). By Act XII of 1855, an action may be maintained by the executors, administrators, or representatives of any person deceased, for any wrong committed in the lifetime of such person, which has occasioned pecuniary loss to his estate, for which wrong an action might have been maintained by such person, so as such wrong shall have been committed within one year before his death (s. 1).

(2). By Act XIII of 1855, whenever the death of a

person shall be caused by wrongful act, neglect, or default, and the act, neglect, or default is such as would (if death had not ensued) have entitled the party injured to maintain an action and recover damages in respect thereof, the party who would have been liable if death had not ensued, shall be liable to an action or suit for damages, notwithstanding the death of the person injured, and although the death shall have been caused under such circumstances as amount in law to felony or other crime. Every such action or suit shall be for the benefit of the wife, husband, parent and child, if any, of the person whose death shall have been so caused, and shall be brought by and in the name of the executor, administrator, or representative of the person deceased. The Court may give such damages as it may think proportioned to the loss resulting from such death to the parties respectively, and the amount shall be divided amongst them in such shares as the Court may direct (s. 1).

Not more than one action or suit shall be brought for, and in respect of, the same subject-matter of complaint; provided that, in any such action or suit, the executor, administrator, or representatives of the deceased may insert a claim for, and recover any pecuniary loss to, the estate of the deceased occasioned by such wrongful act, neglect, or default (s. 2).

A son adopted by the widow of a deceased Hindu is the legal representative of the deceased, and, as such, is entitled to maintain a suit under Act XIII of 1855 for the benefit of the persons, if any, entitled to compensation for the injury occasioned to them by the death of the deceased against those whose negligence caused that death. But such an adopted son is not, however, entitled to have any portion of the damages awarded in the suit allotted to him as a child of the deceased (*Vinayak v. G. I. P. Ry.*, 7 Bom. H. C. 113).

According to Lord Campbell's Act the damages should be in proportion to the "injury" sustained by the deceased (*Blake v. M. Ry.*, 18 Q. B. D. 83); whereas by the Indian law damages should be awarded in proportion to the

"loss" resulting from the death (per Sargent, C. J., in *Ratanbai v. G. I. P. Ry.*, 8 Bom. H. C. o. C. J. 132. *Sorabji v. G. I. P. Ry.*, 7 Bom. H. C. o. C. J. 119 n ; *Lyell v. Ganga Dai*, 1, All. 60, F. B.).

**Continuing injuries.**—All causes of action in respect to injuries of a continuing nature to real property descend with the property to the heir-at-law on the death of the ancestor, or vest in the devisee, remainderman, or personal representatives, in whom the legal estate in the land may be vested by deed, will, or administration (*Vivian v. Champion*, 2 Ld. Raym. 1126).

## (2). DEATH OF THE TORT-FEASOR.

1. Where property, or the proceeds or value of property, belonging to another, have been appropriated by the deceased person and added to his own estate or moneys, an action shall survive against the executor of the wrong-doer. But this rule is limited to the recovery of specific acquisitions or their value, and can only be maintained if there is some beneficial property or value capable of being measured, followed, or recovered (*Phillips v. Homfrey*, L. R. 24 Ch. D. 439). Where, therefore, trees, coals, or minerals wrongfully severed by one man from the soil and freehold of another, have been sold by the wrong-doer, and the latter dies, his estate, in the hands of his executors, is answerable for the price; and an action for money had and received may be maintained against the executors for the recovery thereof (*Powell v. Rees*, 7 Ad. & E. 428). But they are not responsible in damages for injuries done by their testator in cutting down another man's trees, or for trespasses committed by him, in entering in his lifetime upon another man's land, and prostrating fences, or digging therein, where the wrong-doer acquired no gain to himself from the commission of the wrong (*Bishop of Winchester v. Knight* 1 P. W. 406). Nor are executors liable for the negligence of their testator (*Ovrend & Co. v. Gurney*

L. R. 4 Ch. 701) or for his fraud, if his estate has derived no benefit therefrom (*Peek v. Gurney*, L. R. 6 H. L. 377).

2. An action may be maintained against the executors or administrators of any person deceased, for any wrong committed by him in his lifetime to another in respect of his property, real or personal, so as

(a) such injury shall have been committed within six months before such person's death :

(b) such action shall be brought within six months after such executors or administrators shall have taken upon themselves the administration of the estate and effects of such person (3 & 4 Will. IV. c. 42, s. 2).

The damage to be recovered in such actions shall be payable in like order of administration as the simple contract debts of such person (*ib.*).

*Indian law.*—By Act XII of 1855 an action may be maintained against the executors, or administrators, or heirs, or representatives of any person deceased for any wrong committed by him in his life time for which he would have been subject to an action, so as such wrong shall have been committed within one year before such person's death ; and the damages to be recovered in such action shall, if recovered against an executor or administrator bound to administer according to the English law, be payable in like order of administration as the simple contract debts of such person (s. 1).

Plaintiff sued to recover damages from defendant's father Ramdas, for wrongful arrest and malicious prosecution. During the pendency of the suit Ramdas died, and the plaintiff substituted the defendant as his heir and representative. The defendant contended that the suit abated. It was held that the suit abated on the death of Ramdas, his estate having derived no benefit, but, on the other hand, suffered loss, in consequence of his wrongdoing, and that Act XII of 1855 did not apply to a suit such as this, brought originally against the wrong-doer himself, and only subsequently sought to be continued against his heir (*Haridas v. Ramdas*, 13 Bom. 67). Plaintiff sued defendant for his tortious conduct in illegally depriving the plaintiff of the



custody of his children. During the pendency of the suit the defendant died, and his widow was brought on the record as his heir. Held, that the claim was in the nature of *actio personalis*, and that therefore, the cause of action did not, at the death of the defendant, survive as against his widow (*Sharifa v. Munekhan*, 3 Bom. L. R. 167; 25 Bom. 574). In a suit for defamation the plaintiff obtained a decree for damages against the defendant and executed it. The defendant filed an appeal, but died before the hearing. His son was placed on the record. The respondent contended that by the death of the defendant the appeal had abated. Held, that it did not abate (*Gopal v. Ramchandra*, 4 Bom. L. R. 325; 26 Bom. 597).

## 2. *Waiver by election.*

If a man has more than one remedy for the same wrong and elects to pursue one of them, giving the go-by to the others, he must stand and fall by his election; the other remedies are waived.

## 3. *Accord and satisfaction.*

Any one who has a cause of action may agree with the party against whom the action lies to accept in substitution for the right any good legal consideration, and by such acceptance his cause of action is satisfied and he can proceed with it no further. This is called an accord and satisfaction (*C. & L.*, 135). By accord and satisfaction there is a total extinguishment of the original cause of action (*Gabriel v. Dresser*, 15 C. B. 622).

Where the defendant had slandered the plaintiff, and after the utterance of the slander the plaintiff and defendant met, and it was agreed that certain letters and documents in the handwriting of the plaintiff, in the possession of the defendant containing certain proofs against the plaintiff of the truth of the charges made by the defendant, should be burnt, and that no action should be brought, and the letters were burnt, but the plaintiff, nevertheless brought an action, it was held that the accord executed was a bar to the action (*Lane v. Applegate*, 1 Stark. 97). Where the plaintiff who had received some internal injury in a railway collision, but was not aware of it, accepted a small sum of money as compensation for damage done to his clothes and hat, and then brought an action for the injury to the person; it was held that such cause of action was untouched by the accord and,

satisfaction in respect of the injury to the clothes (*Roberts v. E. C. Ry.*, 1 F. & F. 460).

#### 4. *Release.*

Any surrender of a right of action may be spoken of as a release; but the term is usually applied where the surrender is by deed, and, therefore, requires no consideration. A release by indenture is only available in favour of those who are expressed as parties thereto (*Storer v. Gordon*, 3 M. & S. 308). An absolute covenant not to sue is equivalent to a release, and may be so pleaded (*Ford v. Beech*, L. R. 11 Q. B. 871).

#### 5. *Acquiescence.*

Acquiescence, either express or implied, in a wrong takes away the right of action; hence, the maxims *consensus tollit injuriam* and *volenti non fit injuria*. Such acquiescence may be presumed from the plaintiff's slumbering on his rights.

In the following cases the right of action was held to have been taken away by direct acquiescence (*Radha Nath Bannerjee v. Joykishen*, 1 W. R. 288; *Govind Puramanick v. Gooroo Churn*, 3 W. R. 71; *Beni Madhab v. Ramjay*, 10 W. R. 316; *Muddun Gopal v. Nilmanee*, 11 W. R. 304; *Sufroo v. Futteh*, 15 W. R. 505; *Heera Lall v. Purmessur*, 15 W. R. 401; *Shibdas v. Bamandas*, 8 B. L. R. 237, 15 W. R. 360; *Byro Dutt v. Lekhranee*, 16 W. R. 123; *Bromo Moyee v. Koomodinee Kant*, 17 W. R. 467; *Nil Kant v. Jajoo Sahoo*, 20 W. R. 328; *Nicholl v. Tarinee Churn*, 23 W. R. 298; *Lalla Gopee Chand v. Sheikh Liakut*, 25 W. R. 328; *Langlois v. Rattray*, 3 C. L. R. 1; *Kedarnath v. Khettro Pal*, 6 Cal. 34; *Noyna Misser v. Rupikun*, 9 Cal. 609; *Gujadhar v. Nund Ram*, 1 Agra 244; *Fatehyab v. Muhammed*, 9 All. 434).

6. *Judgment recovered.*

When an action is brought and proceeds to final judgment, the original right of action is in any case destroyed. If the plaintiff fails, he is estopped from asserting his alleged right in any other form of legal proceedings against the same party. If he succeeds, the original right in respect of which he sued is merged in the higher and better right which he obtains by his judgment, and he must either bring a fresh action on his judgment or proceed to obtain its fruits by execution (*C & L.*, 137).

The judgment of a foreign Court only creates a simple contract debt, and, although it may estop the parties from disputing the matters of fact there decided, it does not destroy the cause of action (*Higgen's case*, 6 Rep. 45; *Smith v. Nicholls*, 3 Bing. N. C. 208).

**Continuing injuries**—Where the injury is of a continuing nature, the bringing of an action and the recovery of damages for the perpetration of the original wrong do not prevent the injured party from bringing a fresh action for the continuance of the injury. In cases in which damage is not of the essence of the action, as in trespass, a fresh cause of action arises *de die in diem*, and in cases in which damage is of the essence of the action, as in nuisance, a fresh cause of action arises as often as fresh damage accrues.

Where the trustees of a turn-pike road built buttresses to support it on the plaintiff's land, and the plaintiff thereupon sued them and their workmen for such erection, and accepted money paid into Court in full satisfaction of the trespass; it was held that, after notice to the trustees to remove the buttresses and a refusal to do so, the plaintiff might bring another action against them for keeping and continuing the buttresses on the land, to which the former recovery was no bar (*Holmes v. Wilson* 10 A. & E. 503). If a man has dug a pit, or made a trench in another's land, and an action has been brought and damages have been recovered for the injury, such recovery of damages is a complete satisfaction for the wrong done in cutting into the plaintiff's

land, and no other action is maintainable (*Clegg v. Dearden*, 12 Q. B. D. 591); but, where a man digs a trench or deepens a ditch in his own land, which has the effect of injuriously diverting water from his neighbour's stream, or of diminishing the supply of water to a neighbour's well, then there is a continuing injury so long as the trench remains open, and the ditch deepened, and the diverted water is allowed to run through it to the injury of the neighbouring proprietor (*Aldison*).

### 7. *Bankruptcy.*

The property of a bankrupt vests in a trustee, who is the proper party to maintain an action for injuries done to real or personal property of the bankrupt, which has become vested by reason of the bankruptcy. But the trustee cannot maintain an action for injuries to the person or personal feelings of the bankrupt (*Stanton v. Collier*, 23 L. J. Q. B. 116).

### 8. *Statutes of limitation.*

There is a distinction between wrongs which are actionable *per se*, and those which are only actionable where plaintiff can prove that he has suffered actual damage. The period of limitation runs, in the first case, from the time when the wrongful act is committed; in the second, from the time of the plaintiff's first sustaining actual injury.

In England there are various Statutes of Limitations fixing the time during which actions of tort must be brought. Actionable wrongs are in effect divided into three classes, with a different term of limitation for each. These periods of limitations have been briefly summarised by Pollock as follows:—

#### *Six years.*

Trespass to land and goods, conversion, and all other Common law wrongs (including) libel except slander by words actionable *per se* and injuries to the person.

#### *Four years.*

Injuries to the person (including imprisonment).

*Two years.*

Slander by words actionable *per se*.

*Indian Limitation Act* (XV of 1877).—The periods during which suits should be brought against wrong-doers for obtaining redress are as follows :—

*Three years.*

Obstruction to way ; obstruction to, or diversion of, watercourse ; trespass to immoveable property ; infringement of copyright or other exclusive privilege ; waste.

*Two years.*

Loss of, injury to, or delay in delivery of, goods by a carrier ; conversion ; actions under Act XII of 1855 against the representatives of a deceased ; malfeasance, misfeasance or nonfeasance independent of contract.

*One year.*

False imprisonment ; actions under Acts XII and XIII of 1855 by the representatives of a deceased ; injury to the person ; malicious prosecution ; libel and slander ; seduction ; procuring breach of contract ; actionable distress ; wrongful distraint.

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## CHAPTER VIII.

### LIABILITY FOR WRONGS COMMITTED BY OTHERS.

A PERSON may be liable in respect of wrongful acts or omissions of another in three ways :—

(A) As having ratified or 'authorized the particular act :

(B) As standing towards the other person in a relation entailing responsibility for wrongs done by that person though not specifically authorised, and even, in some cases, though expressly forbidden : and

(C) As having abetted the tortious acts committed by others.

#### (A) RATIFICATION.

“ It is a known and well-established rule of law, that an act done for another by a person not assuming to act for himself, but for such other person, though without any precedent authority whatever, becomes the act of the principal if subsequently ratified by him. In that case the principal is bound by the act, whether it be for his detriment or advantage, to the same extent, and with all the consequences which follow from the same act if done by his previous authority ” (per Tindal, C. J., in *Wilson v. Tumman*, 6 M. & G. 242). *Omnis ratihabitio retrotrahitur et mandato priori æquiparatur* (every ratification of an act relates back and thereupon becomes equivalent to a previous request). Only such acts bind a principal by subsequent ratification as were done at the time on the principal's behalf (*Wilson v. Tumman*, 6 M. & G. 236). What is done by a person on his own account cannot be effectually adopted by another. The doctrine of ratification may thus briefly be presented :—

1. If A commit a trespass, whether to the person or

to property, professing at the time to act on behalf of B, though without authority from him, and B afterwards knowingly ratify the trespass, B may thus be rendered liable for it.

2. If A does a tortious act, either on behalf of himself or as agent for B, and C, with whom A has had no previous communication in regard to it, afterwards ratifies or adopts the act, C will not, by so ratifying or adopting it, incur liability *ex delicto* in respect of it.

To make a man trespasser by relation, from having ratified an act of trespass done in his name and for his benefit, it must be shown that the act was ratified by him with full knowledge of its being a trespass, or of its being tortious, or it must be shown that in ratifying and taking the benefit of the act he meant to take upon himself, without inquiry, the risk of any irregularity which might have been committed, and to adopt the transaction, right or wrong (*Rani Shamasundari v. Dukhu Mandal*, 2 B. L. R. A. C., 229).

Ratification of a tort by a principal will not free the agent from his responsibility to third persons.

Where a landlord authorized bailiffs to distrain for rent due to him from his tenant of a farm, expressly directing them not to take anything except on the demised premises; and the bailiffs, however, distrained cattle belonging to another person, supposing them to be the tenant's, beyond the boundary of the farm; and the cattle were sold and the landlord received the proceeds; it was held that the landlord was not liable for the value of the cattle unless it were found that he had ratified the acts of the bailiffs with knowledge of the irregularity, or unless it were found that he chose, without enquiry to take the risk upon himself, and to adopt the whole of their acts (*Lewis v. Reade*, 13 M. & W. 834).

*Indian cases.*—The plaintiff let a cargo boat to U, who had been employed by the defendants to land certain goods. During the landing of the goods a dispute arose between him and the plaintiff as to the terms of the hiring, and the plaintiff refused to give up 53 bales of goods still on board, U, and an assistant of the defendants, forcibly took the bales, without satisfying the plaintiff's lien thereon, and the defendants received them into

their godowns. The defendants had received the bales into their godowns without knowing how they had been obtained. Held, that in the absence of of such knowledge on their part, the receipt of the goods did not amount to a ratification of the wrongful act of their assistant and U, so as to render them liable (*Girish Chandra Das v. Gillanders & Co.*, 2 B. L. R. o. c. J., 140. See the judgment of Loch, J., in *Rani Shamasundari v. Dukka*, *sup.*). Where the evidence showed that certain acts of trespass by one of the defendants were for the benefit and on behalf of the members of the committee, and were afterwards adopted and taken advantage of by them when they had acquired a full knowledge of those acts, the defendants for whose benefit the acts were done were liable for the trespass (*Venkatu Naiker v. Srinivassa*, 4 Mad. 410).

#### (B). LIABILITY BY RELATION.

Under this head comes the liability arising from relation such as that of—

- |                                       |                        |
|---------------------------------------|------------------------|
| I. Master and Servant.                | V. Firm and Partner.   |
| II. Owner and Independent Contractor. | VI. Guardian and Ward. |
| III. Principal and Agent.             | VII. Husband and Wife. |
| IV. Company and Directors.            |                        |

#### I. *Master and Servant.*

The relation between a master and servant gives rise to four kinds of liabilities—(1) Liability of master to third persons; (2) liability of servant to third persons; (3) liability of master to servant; and (4) liability of servant to master.

##### (1) LIABILITY OF MASTER TO THIRD PERSONS.

A master is liable to third persons for every such wrong of his servant as is committed in the course of his employment, and for the master's benefit, although the master did not authorize, or was not cognisant of, or had even expressly forbidden the act or omission in question (*Story. Barwick v. English Joint Stock Bank*, L. R. 2 Ex. 265; *Houldsworth v. City of Glasgow Bank*, 5 App. Cas.



326; *Mackay v. Commercial Bank of New Brunswick*, 43 L. J. P. C. 31; *Anunt Dass v. Kelly*, 1 N. W. P. 107). But a master is not liable for the torts or negligences of his servant in any matter beyond the scope of the employment, unless he has expressly authorized them to be done, or has subsequently adopted them for his own use and benefit (*Story*). The principle of the liability of a master for the wrongful acts of his servant is a principle of the law of agency, not merely of the law of torts, and is equally applicable whether the agency is for a corporation in a matter within the scope of the corporate powers or for an individual (per Lord Selbourne in *Houldsworth v. City of Glasgow Bank*, 5 App. Cas. 326).

**Why master liable.**—1. Liability of the master is based on the fiction of an “implied command” (*Blackstone*).

2. It is again said, that it is founded on the maxim *respondeat superior* (let the principal be liable).

There are several limitations to this maxim. It would seem that a master is not liable in trespass for wilful act of his servant if done for the servant’s own purposes, and not in furtherance of the interests of his master. The maxim does not apply where the relationship existing between the parties has terminated before the commission of the act complained of. Nor does it apply to make the master responsible to a servant who sustains bodily hurt whilst discharging the duties incidental to the employment, such hurt having been caused by his own carelessness or negligence through a defect in machinery, or a deficiency of hands, of which the injured party must necessarily have been cognizant, or occasioned by the negligence of a fellow servant, provided the master had been reasonably cautious in selecting as his associates persons possessed of ordinary skill and care (*Broom*).

3. *Qui facit per alium facit per se* (he who does a thing through another is in the same position as if he does it himself); but this is in terms applicable only to authorized acts, not to acts that, although done by the agent or servant in the course of the service, are specifically unauthorized or even forbidden (*Pollock*).

4. It is said that the master ought to be careful in choosing servants: but if this were the reason, a master could discharge himself by showing that the servant for whose wrong he is sued was chosen by him with due care, and was in fact generally well-conducted and competent: which is certainly not the law (*ib.*).

5. According to Chief Justice Shaw "this rule is obviously founded on the great principle of social duty, that every man, in the management of his own affairs, whether by himself or by his agents, or servants, shall so conduct them as not to injure another; and if he does not, and another thereby sustains damage, he shall answer for it" (*Biglow L. C.* 688). *Pollock* says that this is somewhat too widely expressed, for it does not in terms limit the responsibility to cases where at least negligence is proved.

6. A master is considered as bound to guarantee the public against all hurt arising from the carelessness of himself or of those acting under his orders in the course of his business (per Lord Cranworth, in *Barton's Hill Coal Co. v. Reid*, 3 Macq. 283). And it is but reasonable that it should be so, for surely it is more just that he whose orders a servant is bound to receive and obey, should suffer for the misconduct of that servant, in matters within the scope of the authority which he has given to the servant, than that an innocent third person should be prejudiced by such misconduct.

**Servant and master.**—A *servant* is a person who voluntarily agrees, whether for wages or not, to subject him-

self at all times during the period of service to the lawful orders and directions of another in respect of certain work to be done. A *master* is the person who is legally entitled to give such orders and to have them obeyed (*Eversley*, 907). Servants may be roughly classified as: (1) menial servants, including domestic servants; (2) persons employed in non-domestic occupations, such as clerks and persons engaged in offices, shops, factories, and other business occupations, labourers, artisans, and other workmen, etc.; and (3) apprentices (*ibid*). The relation of master and servant exists only between persons of whom the one has the order and control of the work done by the other.

A master is under no liability for the acts of the servant whom he has temporarily lent to another person, the acts of the servant being for the time being beyond his control. When, therefore, an individual lends his servant to another for a particular employment, the servant in respect of acts done in such employment must be considered as the servant of the person by whom he is for the time being employed, although he remains the general servant of his master who has temporarily lent him to such person, and this, apparently, whether his master receives consideration for the services of the servant or whether he lends his servant gratuitously (*Donovan v. Laing*, (1893) 1 Q. B. 629; *Rourke v. White Moss Colliery Co.*, 2 C. P. D. 205).

A person will be considered a servant whether he is hired by the employer personally, or by those who are entrusted by the latter with the hiring of servants or other agents.

If a carriage and horses are let out to hire by the day, week, month or job, and the driver is selected and appointed by the owner of carriage and horses, the latter is responsible for all injuries resulting from the negligent

and careless driving of the vehicle, although the carriage and horses may be in the possession and under the control of the hirer (*Laugher v. Pointer*, 5 B. & C. 572; *Waldock v. Winfield*, (1901) 2 K. B. 596): but the owner will not be responsible where the hirer drives himself or appoints the coachman and furnishes the horses (*Hall v. Pickard*, 3 Camp. 157; *King v. Spurr*, 8 Q. B. D. 104). Where the owner of a carriage, horses and harness, was supplied with a driver by a livery-stable keeper, and provided his own livery for the driver who had driven for him continuously for six weeks, it was held that the driver was the servant of the owner of the carriage, and not of the livery-stable keeper, and the owner therefore was liable for the accident caused by him (*Jones v. Scullard*, (1898) 2 Q. B. 565). A hack-driver, employed on the usual terms of paying so much a day for his hack and keeping the rest for himself, is, as between the cab-proprietor and the public, the servant of the proprietor, who is therefore liable for the cab-driver's negligence while acting within the scope of the purposes for which the cab is intrusted to him (*Powles v. Hider*, 6 El. & Bl. 207). A person who has borrowed a horse and chaise for his own use and enjoyment, and who rides about in it, driven by a friend whom he allows to drive, is responsible for the negligence of the driver (*Whateley v. Palrick*, 2 M. & W. 650).

Some colliery proprietors had agreed with a contractor that he should do some sinking and excavating for them, and that they should place certain of their servants under his entire control. One of these servants, an engineer, fell asleep when he ought to have been particularly wide awake. It was held that the plaintiff, who had suffered injury in consequence, could not maintain an action against the colliery proprietors, because though the engineer remained their general servant, yet he was acting as the contractor's servant at the time of the accident (*Rourke v. White Moss Colliery Co.*, 2 C. P. D. 205; *Donovan v. Laing W. & Synd.*, (1893) 1 Q. B. 692; see also *Murray v. Currie*, L. R. 6 C. P. 24). The defendants lent a crane with a man in charge to another firm. While under the orders of the other firm, the man in charge worked the crane negligently and injured the plaintiff. Held, that although the man remained the general servant of the defendants, yet as he was not under their control, they were not responsible for his negligence (*Donovan v. Laing*, (1893) 1 Q. B. 629). A ship-owner appointed a captain to his ship A, leaving the appointments of the officers and crew to the captain. In the course of a voyage down a river, the ship A, through the negligence of those on board caused damage to the ship B. Subsequently in consequence of a storm the ship A sank in the fair way and became a total wreck. Ship C, not knowing of and not being able to see the wreck of ship A, ran foul of it and was damaged. It was held that the ship-owner was liable for the acts of those on board though he did not appoint them and that B could claim compensation.

from the owner of the ship A as the damage resulted from the negligence of his men; but he was not liable for damage to ship C, as after the wreck of A its owner ceased to have any control over it (*Brown v. Mallett*, 5 C. B. 599). Shipowners contracted with stevedores to discharge a ship, but agreed with them that the tackle of the ship used in the discharge should be worked by members of the crew, who were to be in the employment and control of the ship-owners. By the negligence of a member of the crew, a winchman, so using the tackle, a labourer in the employ of the stevedores was injured. Held, that as the winchman was not in the employ of the stevedores nor subject to their order and control, the ship-owners remained liable for his negligence (*Union Steamship Co. v. Claridge*, (1894) A. C. 185).

*Indian cases.*—The plaintiffs sued the proprietor of a buggy for damages sustained by them by reason of the negligence of the driver of the buggy who had run against and killed one of the plaintiffs' horses. It was proved that the arrangement between the defendant and the driver was that the driver should be entrusted with the buggy and the use of two horses for the day to be used entirely at the driver's discretion for the purpose of plying for hire. The driver was to pay a certain sum for the use of the buggy and horses, and all that he made above that sum was his perquisite for his labour. Held, that the relation between the proprietor and the driver was that of the master and servant, and therefore the proprietor was liable (*The Bombay Tramway Co. v. Khairaj Tejpal*, 7 Bom. 119).

Course of employment and 'scope of authority,' are equivalent terms, and both extend the master's liability beyond the actual authority given to the servant (*Dyer v. Munday*, (1895) 1 Q. B. 742). The injury done by a servant in the course of his service or employment for which the master becomes liable is very admirably classified by Pollock (and his classification is followed in the recent case of *Iswar Chunder v. Satish Chunder*, 30 Cal. 211) in the following manner:—

(1). The wrong may be the natural consequence of something being done by a servant with ordinary care in execution of the master's specific orders.

Here the servant is the master's agent in a proper sense, and the master is liable for that which he has truly commanded to be done. He is also liable for the natural consequences of his orders, even though he wished to

avoid them and desired his servant to avoid them (*Gregory v. Piper*, 9 B. & C. 591).

Where the defendant, who disputed the plaintiff's right of way through a yard, employed a labourer to lay down rubbish in order to obstruct the way, but gave him orders not to let any of the rubbish touch the plaintiff's wall; the labourer executed those orders as nearly as he could, but some of the rubbish, it being of a loose kind, naturally shingled down towards and ran against the plaintiff's wall: the defendant was held liable (*Gregory v. Piper*, *sup.*). A was riding on a public road with B, a groom, accompanying him on horse-back. A pushed on, and B who was behind, in order to keep up with him, spurred his horse just as he was passing a waggoner C. The horse kicked and injured C. B was held to have been acting within the scope of his employment. He was A's instrument and A was answerable to C (*North v. Smith*, 10 C. B. N. S. 572). Where servants of A brought a coach with two ungovernable horses into a public place to train them, and they being not to be managed ran upon the plaintiff, A was held liable for the damage occasioned (*Michael v. Alestree*, 2 Lev. 172). Masters have been held liable for negligent driving (*Jones v. Hart*, 2 Salk. 441) or for negligently lighting fire (*Tuberville v. Stampe* Ld. Raym. 264; *Filliter v. Phippard*, 11 Q. B. 347; *Black v. Christchurch*, (1894) A. C. 48).

(2). The wrong may be due to the servants' want of care in the carrying on the work or business in which he is employed.

Here it must be established that the servant is a wrong-doer, and liable to the plaintiff, before any question of the master's liability can be entertained. If the servant, instead of doing that which he is employed to do, does something which he is not employed to do at all, the master cannot be said to do it by his servant, and therefore is not responsible for the negligence of his servant in doing it (*Mitchell v. Crassweller*, 13 C. B. 237).

Whether the servant is really bent on his master's affairs or not is a question of fact. Not every deviation of the servant from the strict execution of duty, nor every disregard of particular instructions, will be such an interruption of the course of employment as to determine or suspend the master's responsibility. But where there is

not merely deviation, but a *total departure* from the course of the master's business, so that the servant may be said to be "on a frolic of his own" the master is no longer answerable for the servant's conduct.

There is no rule of law to prevent a master being liable for negligence of his servant whereby opportunity was given for a third person to commit a wrongful or negligent act immediately producing the damage complained of. Whether the original negligence was an effective cause of the damage is a question of fact in each case (*Englehart v. Farrant & Co.*, (1897) 1 Q. B. 240).

**Master liable.**—Where a contractor forbade his workmen to leave their horses, or to go home during the dinner hour and owing to disregard of this order, a horse which was left unattended ran away, and injured plaintiff's railings, the master was held responsible, on the ground that the workman was acting within the general scope of his authority to conduct the horse and cart during the day. In this case, there was a temporary deviation (*Whatman v. Pearson*, L. R. 3 C. P. 422). Lipton, a grocer, had kept a van for the purpose of his business, and in accordance with an arrangement made between him and the other defendants, Farrant and Co., they supplied him with a horse and a driver, named Mears, he himself providing a boy, named Tucker, to deliver goods from the van at the customer's houses. The boy was expressly forbidden to drive, and Mears was expressly forbidden not to leave the van. While the van was being used in Lipton's business, Mears stopped it outside his house in order to get some oil for the lamp which the boy used inside the van, and left the boy in charge of the van. While Mears went into his house to get the oil, Tucker drove the van about 50 yards down the road, in order to turn and so save time, and while so doing he drove the van into the plaintiff's vehicle and injured it. The plaintiff brought an action to recover damages. It was held that defendant Lipton alone was liable, because both Mears and Tucker were in his service, and the defendants, Farrant and Co., were not liable. Lopes, L. J., remarked:—"If Tucker had not been in the cart, and Mears had left the cart unattended, and the horse had moved on, and an injury had been caused to a passer-by, or if a passer-by had jumped into the cart and driven it and injured some person by negligent driving, Lipton would have been liable. Again, if Mears had asked a passer-by to stand at the head of the horse while he was absent, and the passer-by had left the horse, and the horse had gone

on, and injury had been caused to any person, Lipton would be liable" (*Engelhart v. Farrant & Co., and Lipton*, (1897) 1 Q. B. 240).

Defendant's coachman struck plaintiff's horses with his whip, in consequence of which they moved forward and the plaintiff's carriage was upset. At the time when the horses were struck the two carriages were entangled. The defendant was held liable. "If a servant driving a carriage, in order to effect some purpose of his own, *wantonly* strike the horses of another person, and produce the accident, the master will *not* be liable. But if, in order to perform his master's orders, he strikes, but *injudiciously* and in order to extricate himself from a difficulty, that will be negligent and careless conduct, for which the master *will be* liable, being an act done in pursuance of the servant's employment" (*Croft v. Alison*, 4 B. & A. 590). A master was held liable for the negligent driving of his cart in the city by his servant, although it was proved that it ought not, in carrying out his orders, to have been in the city at all (*Joel v. Morison*, 6 C. & P. 501). Where defendant's general manager was possessed of a horse and gig, which he used for the defendant's business as well as his own, and was allowed to keep them on the defendant's premises at his expense; and on one occasion the manager, on putting the horse into the gig, told the defendant he was going to S to collect a debt for him (defendant) and afterwards to see his own doctor; but before he got to S he ran the gig against and killed the plaintiff's horse. Held, that the defendant was responsible (*Patten v. Rea*, 26 L. J. C. P. 235; 2 C. B. N. S. 606). Where defendant's two servants were directed to take two horses from their stables to a forge to be shod; and they raced along the road to see who could get to the forge first, and the noise they made caused the plaintiff's horse to take fright and bolt, whereby the plaintiff was upset and injured. Held, that the defendant was liable (*Gracey v. Belfast Tramway Co.* '01, Ir. R. 322). Where the defendants sent a barge under the management of a lighterman to a wharf to be loaded; but he was unable to get up to the wharf, in consequence of a barge belonging to the plaintiff lying in the way, without any one in charge of it; the foreman of the wharf told him to shove the other barge away, as it had no business there, and to bring his alongside; he then moved the plaintiff's barge from the wharf, and made it fast to a pile in the river; but when the tide went down, the barge settled upon a projection in the bed of the river and was injured. Held, that the defendants were liable (*Page v. Defries*, 7 B. & S. 137). A ship entered a dock to load, while crossing the dock she was disabled, and there being no dry dock, with the permission of the harbour-master put into a lock to ground. On grounding she sustained damage owing to the existence of a silt at the lock's bottom, which the harbour-master had represented was level. Held, that the harbour-master was guilty of a breach of duty by giving the permission and making the representations, and that the dock owners were liable (*Owners*



of *Apollo v. Port Talbot Co.* (1891) A. C. 499).

Where a stevedoor employed to ship iron rails had a foreman, whose duty it was to carry the rails from the quay to the ship after the carman had brought them to the quay and unloaded them there, and the carman not unloading the rails to the foreman's satisfaction the latter got into the cart, and threw out some of them so negligently that one fell upon and injured the plaintiff; it was held that the foreman's act made the stevedoor liable (*Burns v. Poulson*, L. R. 8 C. P. 567). M, a cloak-room clerk in the defendant's employ, used to take up parcels for passengers from the cloak-room to the train as part of his duty. A passenger had asked him to take a parcel to the train, which he did, and as he was running back, he ran against another porter, who in his turn came against the ticket-collector, and the ticket-collector upset the plaintiff's wife, causing injuries which resulted in her death. Held, that the defendants were liable (*Milner v. G. N. Ry.*, 50 L. T. 367). The plaintiff, who was a manufacturer of jewellery, hired from the defendant, who was a job-master, a brougham and horse with a driver at £3 a week, the brougham to be used by the plaintiff's traveller for taking out his goods. While the brougham was out one day with the plaintiff's traveller, the latter left it standing outside an hotel where he went in to have his lunch. The driver thereupon went away to have his dinner, leaving the brougham unattended; while so unattended the brougham was driven away and the contents were stolen. In an action to recover the value of the goods lost owing to the negligent act of the driver in leaving the brougham unattended, it was held, that the defendant was liable for the negligence of the driver (*Abrahams v. Bullock*, 18 T. L. R. 701).

*Indian case.*—A boat which S let to G for unloading a ship was lost in consequence of the negligence of the mate. S sued the captain for the damage sustained. Held, that the captain was not absolved from liability because the injury was caused by the negligence of the crew, although they acted contrary to his orders (*Sutherland v. Shaw Bourke*, A. O. C. 92).

**Master not liable.**—Where the defendant employed a carpenter to make a sign board, and obtained permission for him to make it in the plaintiff's shed and the carpenter in lighting his pipe negligently set fire to the shed, it was held that the plaintiff could not recover against the defendant; for the act of the carpenter in lighting his pipe was not connected with the employment on which he was engaged by the defendant (*William v. Jones*, 3 H. & C. 602).

In cases where *the enterprise is entirely the servant's*—if, for instance, he takes his master's carriage without leave for purposes entirely his own—the master is not responsible. A city wine-merchant sent a clerk and carman with a horse and cart to deliver wine, and to bring back a quantity of empty bottles. On the homeward journey, after crossing a bridge, they should have

turned to the *right*: instead of that they turned to the *left*, and went in the opposite direction on some *private matter of the clerk's*. While thus going quite against the orders, they ran over a child. It was held that the wine-merchant was not responsible (*Storey v. Ashton*, L. R. 4 Q. B. 476; *Mitchell v. Crassweller*, 13 C. B. 237).

B, a coachman of A, without A's knowledge, took his carriage out for his *own* purposes, and in the course of the drive ran it up against C's carriage. A was not held liable although B had used the opportunity of being out with the cart to call on A's customers and do jobs of such a nature as he was usually employed to do (*Rayner v. Mitchell*, L. R. 2 C. P. 357). Where the plaintiff had been injured by the negligent driving of the conductor of an omnibus who, at the end of a journey, and in the absence of the regular driver, took charge of the omnibus and drove it round through some neighbouring by-streets, apparently with the intention of turning it round, ready to start for the next journey, the defendants (masters) were not held liable (*Beard v. London General Omnibus Co.* (1900) 2 Q. B. 530). A passenger was getting out of an omnibus before it stopped, when the conductor told her to wait. She continued to move towards the door, and he took her hand and supported her to the step, from which she fell to the ground. Held, that this was not such negligence on the part of the servant as to render the master liable (*Lingard v. Kirkpatrick*, 15 L. T. 245).

The plaintiffs were law-publishers, and the defendants were some solicitors occupying premises over the plaintiffs' shop. In the private room of one of the defendants was a lavatory, which the clerks had clear instructions *never to use*. One day a disobedient clerk, thinking no one would ever know, went into the room to wash his hands. He turned the tap, but the water did not flow: and then went out. But after he had gone out, the water did flow, and flowed so abundantly that a large number of treatises of the plaintiffs down below were spoilt. In the action against the solicitors for the mischief thus inflicted, it was held that the act of the clerk was not within the scope of his authority, or incident to the ordinary duties of his employment, and therefore his masters were not liable (*Sterens v. Woodward*, 6 Q. B. D. 380; 50 L. J. Q. B. 231). But where a clerk upon leaving off his day's work, turned on the tap in a lavatory provided for the *use of himself and other clerks* in the defendant's service, and then went away without turning the tap off, so that in the night the water flowed, and going through the floor, damaged the plaintiff's goods in the room below, the employer of the clerk was held responsible for the clerk's negligence (*Ruddiman v. Smith*, 60 L. T. 708).

Where defendant's servant burnt down a house demised to the defendant by lighting furze and straw, with a view to cleanse a chimney which smoked, *although she had been cautioned* against the danger of such a proceeding (*McKenzie v. McLeod*, 10 Bing. 385; 3 L. J. C. P. 79); where defendant sent

his servant on an errand *without providing* him with a horse and he met a friend who had one and who permitted him to ride, and an injury happened in consequence (*Goodman v. Kennell*, 3 C. & P. 167); where the manager of defendants, the proprietors of a sewage farm, trespassed upon the land of an adjoining owner, *without their express authority*, to improve the drainage from the farm and benefit the neighbourhood (*Bolingbroke v. Swindon Local Board*, L. R. 9 C. P. 575); where a master of a ship signed a bill of lading for goods which had *never* been shipped (*Grant v. Norway*, 10 C. B. 665; see *Whitechurch v. Cavanagh*, 85 L. T. 349; *Coleman v. Riches*, 16 C. B. 105); and where defendant employed another to do an act which might be done in a *lawful* manner, but the latter in doing it committed a public nuisance (*Peachey v. Rowland*, 13 C. B. 105), it was held in all these cases that the defendants, masters, were not at all responsible.

(3). The servant's wrong in excess or mistaken execution of a lawful authority.

To make the master liable it must be shown here that:—

(a) the servant intended to do on behalf of his master something of a kind which he was in fact authorized to do;

(b) the act, if done in a proper manner, or under the circumstances erroneously supposed by the servant to exist, would have been lawful. The master is chargeable only for acts of an authorized class which in the particular instance are wrongful by reason of excess or mistake on the servant's part. For acts which he has neither authorized in kind nor sanctioned in particular, he is not chargeable. Interference with passengers by guards and arrest of supposed offenders by servants fall under this head.

It is not necessary to show that the master expressly authorized the particular act. It is sufficient to show that the servant was engaged at the time in doing his master's business, and was acting within the general scope of his authority; and this although he departed from the private instructions of the master, abused his

authority, was reckless in the performance of his duty, and inflicted unnecessary injury (*Rounds v. Delaware*, 64 N. Y. 129). When the act would not be *within the scope of his authority*, though done properly, the master is not liable.

When the plaintiff, a passenger on the defendants' line, sustained injuries in consequence of being *violently pulled out* of a railway carriage by one of the defendants' porters who acted under the erroneous impression that the plaintiff was in the wrong carriage (*Bayley v. M. S. & L. Ry.*, L. R. 7 C. P. 450); where a passenger was ejected from a railway carriage by the railway company's servants *without excessive violence* under an erroneous supposition that he was travelling wrongfully in the carriage (*Lowe v. G. N. Ry.*, 62 L. J. Q. B. 524); where there was authority to arrest a passenger for non-payment of his fare for the benefit of the company and the servants of the company arrested the plaintiff by mistake (*Goff v. G. N. Ry.*, L. R. 6 Q. B. 65); where the servant was authorized by the railway company to arrest persons supposed to be guilty of committing offences for which the company had power to arrest, and the servant made a mistake, and arrested a person whom he supposed to be, but who in fact was not guilty of such an offence (*Moore v. Metropolitan Ry.*, L. R. 8 Q. B. 36; *Kirkstall Brewery Co. v. Furness Ry.*, L. R. 9 Q. B. 468; *Vanden Eynde v. Ulster Ry.*, Ir. R. 5 C. L. 6); where a bye-law of a railway company forbade any persons to ride on luggage cars; and one of the officials, while the train was in motion, ordered a passenger to get off one of the luggage cars; and on his not complying with it, kicked him off, whereby he fell under the wheels, and was much injured (*Rounds v. Delaware &c. Railroad*, 61 N. Y. Ry. 129); where the plaintiff, while standing on the railway platform waiting for her train, was struck and injured by a long bag containing personal luggage which a porter was negligently swinging round (*Buck v. L. & N. W. Ry.*, T. L. R. Apr. 1880); and where a porter negligently let a portmanteau fall on C, who was passing along the platform (*Tubutt v. B. & E. Ry.*, L. R. 6 Q. B. 73); it was held in all these cases that the railway companies were liable.

Where a partially intoxicated passenger in an omnibus refused to get out and pay his fare when the omnibus arrived at its destination, and the conductor dragged him out violently and recklessly, and caused him to fall under the wheel of a passing cab, it was held that the servant had committed a wrongful act, in the course of his employment about his master's business, and, therefore, the omnibus proprietor was responsible for the injury (*Seymour v. Greenwood*, 7 H. & N. 355). A conductor of a tram car had by the company's by-laws power to collect fares which were payable on demand, and to prevent people travelling without paying. A passenger refused to pay his

fare, and thereupon the conductor took him by the collar and pushed him off the car. Held, that the company were liable in respect of the assault upon, and injuries sustained by, the passenger (*Smith v. North Metropolitan Tram Co.*, 55 J. P. 630).

For acts wholly outside authority, a master is not liable. He is not answerable if the servant takes on himself, though in good faith, and meaning to further the master's interest that which the master has no right to do, even if the facts were as the servant thinks them to be.

Where a station master having demanded payment for the carriage of a horse conveyed by defendant company arrested and detained plaintiff for non-payment thereof until it was ascertained by telegraph that all was right, and the railway company had no power to arrest for non-payment of carriage; it was held that the railway company were not liable, as the station master in arresting the plaintiff did an act which was wholly illegal not merely in the mode of doing it, but in the doing of it at all (*Poulton v. L. N. S. W. Ry.*, L. R. 2 Q. B. 534). A foreman porter in the service of a railway company, who in the absence of the station master is temporarily in charge of station, has no implied authority to give in charge a person whom he suspects to be stealing the company's property; and if he gives an innocent person in charge on such suspicion, the company is not liable (*Edwards v. L. & N. W. Ry.*, L. R. 5 C. P. 445). A company's booking clerk gave into custody a person suspected of robbing the till, after the attempt had ceased; it was held that as there was no implied authority for the act the company was not liable (*Allen v. L. & S. W. Ry.*, L. R. 6 Q. B. 65).

A quarrel having arisen on the premises of a railway company between a servant of the company and a number of persons amongst whom was plaintiff, the servant gave him into custody on a charge of assaulting him and obstructing him in the discharge of his duty. In an action by the plaintiff against the company for an assault and false imprisonment, it was held that the company was not responsible (*Lumsden v. L. & S. W. Ry.*, 16 L. T. 609).

The manager of a bank has no implied authority to give a man into custody for stealing a bill of exchange when the arrest is not necessary for the protection of the property of the bank, but was only for the purpose of punishing him and vindicating the law (*Bank of New South Wales v. Owston*, 4 App. Cas. 270).

Where a tramway company gave to their conductors printed instructions not to give passengers into custody without the authority of an inspector or time-keeper, and the conductor of a car detained the plaintiff on a charge of

attempting to pass false money; it was held, in an action of false imprisonment, that they were not liable (*Charleston v. L. T. Co.*, 86 W. R. 367), but where no such instructions were given the company were held liable (*Furlong v. S. L. Tram. Co.*, 48 J. P. 329).

Plaintiff had offered defendant's bar manager, a foreign gold coin, and on its being refused, gave a half-sovereign in its place for which he received change, and shortly afterwards left the house. The bar manager followed the plaintiff and subsequently gave him in custody for attempting to pass bad coin; it was held that the defendant was not liable, for the manager had no implied authority to arrest the plaintiff as defendant's property was no longer in danger (*Abrahams v. Deakin* (1891) 1 Q. B. 516; *Stevens v. Hinshelwood*, 55 J. P. 341). The manager of a restaurant gave plaintiff, who had partaken of refreshments there, into custody for refusing to pay the amount of the bill, the accuracy of which the plaintiff *bona fide* disputed. In an action against the proprietors of the restaurant for false imprisonment, the jury found that the manager gave the plaintiff into custody to make him pay the bill; it was held that the proprietors were not liable for the act of the manager (*Stedman v. Baker & Co.*, 12 T. L. R. 451: following the above case). The plaintiff was head barman and cellarman in a public house of which the defendant was owner. While the plaintiff was superintending the operation of bringing mineral waters into the cellar, the defendant's manager, acting under the mistaken impression that whisky was being removed from the cellar, sent for a policeman and gave the plaintiff into custody on a charge of stealing whisky. Before reaching the police station the manager admitted that he had made a mistake, and on arrival at the police station the plaintiff was released. In an action by the plaintiff for false imprisonment it was held that the defendant was not liable, as the manager had no implied authority from the defendant to give the plaintiff into custody, and the manager's act was not necessary for the protection of his master's property (*Hanson v. Waller* (1901) 1 K. B. 390).

*Leading case.*—**Poulton v. London & S. W. Ry.**

*Indian cases.*—The servant of the defendant, who was staying in the plaintiff's hotel, broke a filter, the property of the plaintiff. In a suit by the plaintiff for damages it appeared that the servant when he broke the filter was not acting within the scope of his employment, nor on the defendant's business, or for his benefit. The defendant offered to the plaintiff as compensation Rs. 30 (which was refused), but without acknowledging any liability. Held, that the defendant was not liable for the act of his servant, and that the plaintiff was not entitled to a decree for Rs. 30 (*Gray v. Fiddian*, 15 Mad. 73). On a claim by the Official Receiver for damages for the wrongful felling and carrying away of trees growing on part of the estate

held on trust by him, those acts, to the injury of the owners whom he represented, were proved against certain of the defendants holding some employment under others, who were co-defendants with them in this suit. These co-defendants were not proved to have ordered such acts, nor was there any evidence that to cut or carry away timber was within the scope of the employment of any of the defendants. The co-respondent employers were not, therefore, under any legal responsibility in the matter (*Casperz v. Kishori Lal Roy*, 23 Cal. 922).

(4). A wilful wrong, such as assault, provided the act is done on the master's behalf and with the intention of serving his purposes.

A master may be liable for wilful and deliberate wrongs committed by the servant provided they be done on the master's account and for his purposes; and although the servant's conduct is of a kind actually forbidden by the master (*Limpus v. The London General Omnibus Co.*, 1 H. C. 526; *Ward v. The London General Omnibus Co.*, 42 L. J. C. P. 265; *Smith v. The North Metro. Tram. Co.*, (1891) 55 J. P. 630; *Black v. Christchurch Finance Co.*, (1894) A. C. 48. The first part of this proposition is followed in *Iswar Chunder v. Satish Chunder*, 30 Cal. 207, but the second part is expressed to be too broad, *ib.* 211). But he will not be liable for the wilful acts of his servant done contrary to his orders (*Green v. Macnamara*, 1 L. T. 9).

**Liable.**—The driver of an omnibus wilfully and contrary to express orders from his master, pulled across the road, in order to obstruct the progress of the plaintiff's omnibus. In an action for negligence it was held that if the act of driving across to obstruct the plaintiff's omnibus, although a reckless driving, was nevertheless an act done in the course of the driver's service, and to do that which he thought best for the interest of his master, the master was held responsible (*Limpus v. L. G. O. Co.*, *sup.*).

**Not liable.**—A servant who committed an unnecessary assault in levying a distress was not acting within the scope of his authority and did not make his employers responsible (*Richards v. The W. M. Waterworks Co.*, 15 Q. B. D. 660: see *Furloug v. S. L. T. Co.*, 1 C. & E. 316; 48 J. P. 329).

*Leading case.*—**Limpus v. London Gen. Omni. Co.**

**Fraud of servant.**—A person may be liable for a

fraud committed by his agent or servant, if the agent or servant committed it while acting within the scope of his authority, while doing and purporting to do, something on behalf of his employer, although in doing it he commits a wrong which his employer neither sanctioned nor intended. But if the agent or servant is not acting or purporting to act for his employer, the fraud cannot be treated as the fraud of the employer (*Thorne v. Heard*, (1895) A. C. 495). It is furthermore necessary, in order that the employer may be rendered liable, that the fraud should be committed by the agent or servant for his employer's benefit (*Barwick v. English Joint Stock Co.*, L. R. 2 Ex. 259; *Houldsworth v. City of Glasgow Bank*, 5 App. Cas. 317; *British Mutual Banking Co. v. Charnwood Forest Ry.*, 18 Q. B. D. 714). There is no difference between a fraud carried out by means of forgery and any other fraud (*Shaw v. Port Philip Gold Mining Co.*, 13 Q. B. D. 103). Thus a sheriff has been held liable for the fraud of his officer (*Raphael v. Goodman*, 8 A. & E. 565), and an attorney has been compelled to pay costs occasioned by his clerk fraudulently simulating the seal of the Court upon a writ (*Dunkey v. Ferris*, 11 C. B. 457). No sensible distinction exists between the case of fraud and the case of any other wrong (per Wills, J., in *Barwick v. English &c.*, *sup.*). But a master is not liable in an action of deceit for the fraudulent act of a servant committed for the servant's private end (*The British Mutual Banking Co. v. The Charnwood Forest Ry.*, 18 Q. B. D. 714; *Coleman v. Riches*, 16 C. B. 104).

**Delegation of duty.**—A master is not liable for the tortious acts of a stranger to whom his servant has, without authority, delegated his duties, even though there may be an urgent necessity.

The driver of an omnibus, when within a quarter of a mile of his master's



premises, was forbidden by the Police to drive further on the ground that he was not sober. A bystander volunteered to drive the omnibus home, and was authorised to do so by the driver and conductor, no effort being made to communicate with the master. Held, that there was no evidence upon which it could be held that any necessity to delegate the duty of driving to the bystander had arisen, so as to render the master liable. Lord Esher, M. R., said: "The principle of agency of necessity does not extend to such a case, but is restricted to certain well-known cases, such as those of the master of a ship, of the acceptor of a bill of exchange for the honour of the drawer, and of salvors" (*Gwilliam v. Twiss*, (1895) 2 Q. B. 84).

**Criminal act of servant.**—A master may be liable to a civil action in respect of the criminal act of his servant (*Smith v. North Metropolitan Tramways Co.*, (1891) 7 T. L. R. 459). The defence that the act complained of amounted to a felony will not free the master from liability (*Osborn v. Gillett*, L. R. 8 Ex. 88; 42 L. J. Ex. 53; *Dyer v. Munday*, (1895) 1 Q. B. 742). See also the responsibility of principals for the criminal acts of their agents.

The defendant's servant in the course of his employment assaulted the plaintiff and was fined for the assault. The plaintiff brought an action against the defendant for the assault. Held, that the mere fact of the assault being criminal and not merely tortious did not affect the defendant's liability for the acts of his servant (*Dyer v. Munday*, *sup.* See *Coppen v. Moore*, (1898) 2 Q. B. 306).

**Compulsory servants.**—An exception from the rules by which masters are responsible for the acts of their servants is to be found in those cases where they have been obliged by law to employ particular persons, *e.g.*, compulsory pilots. But a master is not relieved from his responsibility for the wrongful act of his servant while doing his master's work, merely because an Act has limited and controlled the choice of the master in the selection of his servants, and has compelled him to choose from a particular class of skilled or educated persons, supposed to be peculiarly fitted for the performance of the duties intrusted to them to discharge (*Martin v. Temperley*, 4 Q. B. D. 298).

**Indian law.**—Where the employment of a pilot is com-

pulsory on board a vessel, and, such pilot being on board, an accident happens through negligence in the management of the vessel, it lies upon the owners, in order to exempt themselves from liability, to show that the negligence causing the accident was that of the pilot. If such negligence is partly that of the master or crew, and partly that of the pilot, the owners are not exempted from liability. If it be proved on the part of the owners that the pilot was in fault, and there is no sufficient proof that the master or crew were also in fault in any particular which contributed, or may have contributed, to the accident, the owners will have relieved themselves of the burthen of proof which the law casts upon them (*Muhammad v. P. & O. S. N. Co.*, 6 Bom. H. C. O. C. J. 99).

**Servant under two masters.**—Where injury is caused by reason of the negligence of defendant's servants, the fact that they are under the direction of another person at the time will not, in all cases, excuse the defendant. Indeed both may be liable.

The lessee of a ferry had hired a steamer of the defendants, with a crew who were the latter's servants. Held, that the defendants were liable for injury to passengers caused by the negligence of the crew, although the passengers had contracted with the lessee of the ferry for conveyance in the steamer, and had paid their fares to him. The ground taken by the Court was that the defendants were by their crew in possession of the vessel: and the liability of the defendants was not changed by the fact that the lessee also might have been liable.

## (2). LIABILITY OF SERVANT TO THIRD PERSONS.

With regard to the liability of a servant to third persons in respect of tortious acts committed by him in the course of his employment, it has been laid down that in respect of acts of non-feasance or negligence in the performance of duty a servant, as such, is under no liability, but in respect of acts of misfeasance or positive wrong he

is liable (*Lane v. Cotton*, 12 Mod. 488). A servant is responsible for his fraudulent acts, and if he knowingly commit a fraud in the course of his master's business, he will be personally liable for it, even if it were authorised by his master, and this in addition to his master's liability (*Cullen v. Thomson*, 6 L. T. 870). He cannot discharge himself from liability on the ground that he acted under unavoidable ignorance (*Hutchinson v. York and Newcastle Ry.*, 5 Exch. 350; *Stephens v. Elwall*, 4 M. & S. 261; *Bennett v. Bayes*, 5 H. & N. 391, 29 L. J. Ex. 224).

Whoever commits a wrong is liable for it himself, and it is no excuse that he was acting as an agent or servant on behalf of and for the benefit of another. When that other person is also liable the party wronged has his remedy against both or either of them at his choice (*Sri Rajah Bounnadevara v. Putman*, 10 M. L. J. R. 185).

The plaintiff entered into a contract with one M, by which the latter was allowed to take loose stones lying, on the surface of certain hills belonging to the plaintiff. In breach of this contract M employed the defendants, his contractors, to excavate and quarry stones. The plaintiff sued the defendants for damages sustained by him by this unlawful quarrying. Held, that the defendants were liable (*Sri Rajah Bounnadevara v. Putman*, *sup.*). Where plaintiff's land was entitled to a supply of water upto a certain date, and the defendant, a Government officer, closed the channel fifteen days too soon, but without any malice or intention to cause harm to the plaintiff, it was held that inasmuch as the plaintiff's right to supply of water was founded on contract, a right of action, in case of the water being improperly withheld, might exist as against Government, but that there was none as against the defendant, by whom no legal injury had been committed. If malicious intention on the defendant's part had been proved the plaintiff might have had a cause of action (*Chinnappa v. Silka*, 21 Mad. 36).

### (3). LIABILITY OF MASTER TO SERVANT.

The liability of a master for accident happening to his servant is, it has been said, not due to principles peculiar to the relation of master and servant, so much as to the application of the general governing principles of law that

where fault is there is liability, *culpa tenet suos auctores tantum*, and that in the absence of fault there is, *prima facie* at any rate, an absence of liability. The duty which the master owes the servant is just the same that he owes to every other person with whom he has business relations; he must not conceal from him dangerous circumstances which if known might cause him to alter his position, nor personally be negligent in any respect (*Beven*, i. 734).

Liability of master to servant for injuries incurred by a servant during service will arise in three different ways:— (1) At Common law; (2) under the Employers' Liability Act, 1880; and (3) under Workmens' Compensation Acts, 1897 and 1900.

#### (1) *Common law.*

The Common law rule is that a master is not liable to his servant for injuries received from any ordinary risk of or incident to the service, including acts or defaults of any other person employed in the same service (*Priestly v. Fowler*, 3 M. & W. 1; *Wilson v. Merry*, L. R. 1 H. L. Sc. 326). A servant, when he engages to serve a master, undertakes, as between himself and his master, to run all the ordinary risks of the service, including the risk of negligence upon the part of a fellow-servant when he is acting in the discharge of his duty as servant of him who is the common master of both (per Erle C. J., in *Tunney v. Midland Ry.*, L. R. 1 C. P. 296; *Hutchinson v. The Y. N. B. Ry.*, 5 Ex. 343; *Redgrave v. Belsey*, 13 T. L. R. 484; *Waller v. S. E. Ry.*, 2 H. & C. 102).

Where several workmen engage to serve a master in a common work, they know, or ought to know, the risks to which they are exposing themselves, including the risks of carelessness against which their employer cannot secure them, and they must be supposed to contract with reference

to such risks (per Lord Cranworth in *Bartons Hill's Coal Co. v. Reid*, 3 Macq. 295).

For damage caused by the ordinary risks of employment the master is not liable. First, because there is no fault in the master; second, because the risk arises out of the very thing to be done—the coming in contact with agencies that may be dangerous and men who may be negligent, with respect to which the master can exercise no absolutely protective power, or does not specifically contract to do so; third, because workmen undertaking a work must be supposed to have a provision of its ordinary risks as well as of its labours, and as they secure by their engagement remuneration for the one they must be held to secure insurance in their wages against the other (*Beven*, i. 735). Thus if the person occasioning, and the person suffering, the personal injury, are fellow-workmen engaged in a common employment, and under a common master, such master is not responsible for the results of the injury. The principle of the master's immunity in such cases, frequently termed the doctrine of *collaborateur*, is of comparatively recent origin. In the law of England it can hardly be traced further back than *Priestley v. Fowler* (3 M. & W. 1) which was decided in 1837.

Although a workman may, having full knowledge and appreciation of the risk he runs, nevertheless agree with his employer to run this risk, yet it is no part of the implied contract of service that the workman takes the risk of injury arising from his employer's negligence, neither can such a contract be implied from the workman's continuance in the employment with knowledge of the risk (*Smith v. Baker*, (1891) A. C. 3; *Williams v. Birmingham B. & M. Co.*, (1899) 2 Q. B. 338).

**Common employment** does not necessarily imply that both servants should be engaged in precisely the *same* or

even *similar* acts (*Barton's Hill Coal Co. v. Reid*, 3 Macq. 266). There are many cases where the immediate object on which the one servant is employed is very dissimilar from that on which the other is employed, and yet the risk of injury from the negligence of one is so much a natural and necessary consequence of the employment which the other accepts, that it must be included in the risks which have to be considered in his wages (per Blackburn, J., in *Morgan v. Vale of Neath Ry.*, L. R. 1 Q. B. 149). All persons engaged under the *same* employer for the purposes of the same business, however different in detail those purposes may be, are fellow servants in a common employment, *e.g.*, a carpenter doing work on the roof of an engine-shed, and porters moving an engine on a turn-table (*Morgan v. Vale of Neath Ry.*, *ubi. sup.*); a chief engineer and one of the ordinary seamen employed by the same company (*Searle v. Lindsay*, 11 C. B. N. S. 429); a railway guard and a gauger of plate-layers in the service of the same company (*Waller v. South-Eastern Ry.*, 2 H. & C. 102; 32 L. J. Ex. 205); a builder's labourer and his foreman (*Wigmore v. Jay*, 5 Ex. 354; 19 L. J. Ex. 300); the master of a ship and one of the sailors employed by the same company (*Hedley v. Pinkney Shipping Co.* (1894) A. C. 222); a labourer employed in loading trucks and a deputy foreman of plate-layers (*Lovegrove v. L. B. & S. C. Ry.*, 16 C. B. N. S. 669); one of a gang of scaffolders and the foreman of the gang (*Gallagher v. Piper*, *ibid*); a miner and an underlooker whose duty it was to superintend the mining operations (*Hall v. Johnson*, 3 H. & C. 589); a manager of barges and a man employed in lowering sacks (*Lovell v. Howell*, 1 C. P. D. 161); a general traffic manager and a milesman (*Conway v. B. & N. C. Ry.*, Ir. R. 11 C. L. 345). But a compulsory pilot is not a fellow-servant of the crew (*Smith v. Steele*, L. R. 10 Q. B. 125); nor are the crew of a tug and

the crew of the tow (*Bland v. Ross*, 14 M. P. C. 210; *Spaight v. Tedcastle*, 6 App. Cas. 217); nor the masters and crews of two different ships belonging to the same owners (*The Petrel*, (1893) P. 320).

One test of common service is that when the two servants are servants of the *same* master, and where the service of each will bring them so far to work in the same place and at the same time, that the negligence of one in what he is doing as part of the work which he is bound to do, may injure the other whilst doing the work which he is bound to do, the master is not liable to the one servant for the negligence of the other, for it is a common service (*Charles v. Taylor*, 3 C. P. D. 492). The relative rank of servants is immaterial.

Unless the injured person and the servant whose negligence caused the injury were not only engaged in common employment, but were in the service of a common master, the defence of common employment is not applicable (*Johnson v. Lindsay*, (1891) A. C. 371). The injured man must be at the time of the injury in the defendant's actual employment in the relationship of master and servant (*Cameron v. Nystrom*, (1893) A. C. 308).

At Common law the following duties are imposed on masters or employers:—

1. The master is bound to provide proper and competent fellow-servants (*Wilson v. Merry*, L. R. 1 H. L. 326). If he has employed a servant, knowing him to be incompetent, or without satisfying himself that he is competent for the duties required of him, he would be responsible, but not otherwise (*Laning v. N. Y. C. Ry.*, 49 N. Y. R. 521; *Wiggett v. Fox*, 11 Ex. 832; *Wigmore v. Jay*, 5 Ex. 354; *Barton's Hill Coal Co. v. Reid*, 3 Macq. 266; *Scarle v. Lindsay*, 11 C. B. N. S. 429; *Smith v. Howard*, 22 L. T. 130; *Allen v. New Gas Co.*, 45 L. J. Ex. 668).

2. The master is bound to take all reasonable precautions to secure the safety of his servants or workmen (*Brydon v. Stewart*, 2 Macq. 30; *Paterson v. Wallace*, 1 Macq. 748). On the master rests "the duty of taking reasonable care to provide appliances, and to maintain them in a proper condition, and so to carry on his operations as not to subject those employed by him to unnecessary risk" (per Lord Herschell in *Smith v. Baker* (1891) A. C. 325). Every master, who employs servants and workmen to work upon his land, house, or premises, is bound to take all reasonable precautions for their safety, and if hidden and secret dangers exist upon his premises, known to him and unknown to his workmen, it is his duty to disclose them to the latter, that they may take precautions against them (*William v. Clough*, 3 H. & N. 258). And it is in all cases the master's duty to be careful that his workmen be not induced to work under the notion that the tackle, scaffolding, or rope with which they work is secure, when the master knows or has reasonable ground for believing that it is unsafe and dangerous. He must provide safe and efficient machinery (*Williams v. Mathieson*, 4 Macq. 215). A negligent system or a negligent mode of using perfectly sound machinery may make the employer liable quite apart from any of the provisions of the Employers' Liability Act (per Lord Halsbury in *Smith v. Baker*, (1891) A. C. 339).

But "the mere relation of the master and the servant never can imply an obligation on the part of the master to take more care of the servant than he may be reasonably expected to do of himself. He is, no doubt, bound to provide for the safety of his servant in the course of his employment, to the best of his judgment, information, and belief" (per Lord Abinger in *Priestley v. Fowler*, 3 M. & W. 6).

3. The master should not be guilty of personal negligence causing injury to the servants (*Williams v. Birming-*



*ham Battery Co.*, (1899) 2 Q. B. 338; *Ashworth v. Stanwix*, 30 L. J. Q. B. 183). For his own personal negligence a master is always liable (per Lord Herschell in *Smith v. Baker*, (1891) A. C. 325; per Bowen, L. J., in *Thomas v. Quartermain*, 18 Q. B. D. 685). This liability exists although there may also be negligence on the part of a fellow-servant (*Roberts v. Smith*, 2 H. & N. 213; *Ormond v. Holland*, E. & E. 102). This Common law duty is a personal duty only, and passes from the master when he delegates his duties as employer to other hands. Thus, if a master does not personally interfere and leaves the selection of materials to a *competent* foreman or superintendent he is not liable (*Wigmore v. Jay*, 5 Ex. 358; *Gallaghan v. Piper*, 16 C. B. N. S. 669; *Feltham v. England*, 7 B. & S. 676).

**Master liable.**—Where the plaintiff, a collier, was employed by the defendants in their mine and was dangerously wounded by a stone by reason of the unsafe condition of the shaft owing to the defendants' negligence, and the mine was worked under the superintendence of one of the defendants, and the plaintiff was not aware of the state of the shaft, it was held that the defendants were liable (*Mellors v. Shaw*, 30 L. J. Q. B. 333). Where a master ordered a servant to take a bag of corn up a ladder which the master knew and the servant did not know, to be unsafe, and the ladder broke, and the servant was injured, the master was held liable (*Williams v. Clough*, 3 H. & N. 258). Where defendants, well-knowing that certain carcasses were diseased and infectious, employed the plaintiff, who was ignorant of that fact, to cut them up, whereby the plaintiff was injured, it was held that the defendants were liable (*Davies v. England*, 33 L. J. Q. B. 321). Plaintiff was employed by defendant as a dress-maker. It was no part of her duty to go down into the kitchen, but on one occasion she went there, at the request of the defendant, to fetch something up. As she was leaving the kitchen a savage dog, which was generally tied up, rushed from under the table and bit her leg. The plaintiff was aware that a dog of this kind was kept on the premises. Held, that the defendant was liable, inasmuch as the risk was not incidental to the service (*Mansfield v. Baddley*, 34 L. T. 696). C owned a mischievous dog, which was kept at his stables under the care and control of his coachman, who knew the dog to be mischievous. C supposed the dog to be quite harmless. B having been bitten by the dog, and having brought an action for the injuries, the master was held

liable as the knowledge of servant was sufficient evidence of *scienter* (*Baldwin v. Casella*, L. R. 7 Ex. 325). Where a cab proprietor sent out a restive horse, he was held liable for injuries resulting to driver (*Fowler v. Lock*, 30 L. T. 810). Where A, the owner of a dock, under a contract with B, erected a staging round B's ship, it was held that A had a duty to provide appliances fit for use at the time, and was therefore liable to C, a workman employed by B to work on the ship, who was injured from a defect in the staging, though after its erection it ceased to be under A's control (*Heaven v. Pender*, 11 Q. B. D. 503).

Where a workman was employed on an elevated tramway and his employers provided no ladder or other safe means of ascending to or descending from it, and the servant in descending from it slipped and was killed by his fall, it was held that the master was liable (*Williams v. Birmingham B. & M. Co.*, (1899) 2 Q. B. 338).

Where the injury to the plaintiff was caused by the fall of the iron door of his employer's warehouse it was held that where the injury was from the unsafe state of the premises, the claim must allege not only that the master knew, but that the servant was ignorant of the danger (*Griffiths v. London & St. K. Dock Co.*, 13 Q. B. D. 259). Plaintiff was a workman in the employ of builders who were erecting a house. The defendants contracted with the builders to construct a lift in the house, and the plaintiff, at their request, was selected by the builder's foreman to D, their man, in putting up the lift. In obeying D's order the plaintiff received injury. Held, that the defendants were liable for the injury (*Wild v. Waygood*, (1892) 1 Q. B. 783). If one partner acts as a workman, or otherwise interferes, and by negligence causes damage to his workman, all his partners are also equally liable (*Ashworth v. Stanwix*, 7 Jur. N. S. 467).

Where two vessels come into collision with each other, belonging to the same owners and the same line, and frequent the same port and river in which the collision occurred, the master and crew of one vessel are not in a common employment with the master and crew of the other vessel (*The Petrel*, (1893) P. 230).

**Master not liable.**—A master is not liable to an action, at the suit of his servant, for an injury to the thigh sustained by the latter caused by the breaking down of a carriage in which the servant was riding on his master's business through a defect in the carriage which was overloaded of which the master was not aware (*Priestly v. Fowler*, 3 M. & W. 1; 7 L. J. Ex. 42). Where the thigh of defendant's servant was fractured owing to the overloading of a cart in the charge of another servant, it was held that the servant was not entitled to recover damages (*Charles v. Taylor*, 3 C. P. D. 498). Where a workman at the top of a building carelessly let fall a heavy substance upon a fellow workman at the bottom, the master was held not to be responsi-

ble, without proof of the incompetency of the workman causing the injury to discharge the duty in which he had been employed (*Wiggitt v. Fox*, 25 L. J. Ex. 188). The plaintiff was in the service of the defendant, a maker of locomotive engines. The defendant had control over his establishment but was not present; his foreman or manager directed a crane, on which an engine was hoisted to be moved over fresh piers of brick-work, and ordered the plaintiff to get on the engine to clean it. The piers gave way, the engine fell, and the plaintiff was injured; it was held that the fact that the servant who was guilty of negligence was a servant of superior authority, whose lawful directions the other was bound to obey, was immaterial, and as there was no evidence of personal negligence on the part of the defendant, and nothing to show that he had employed unskilful or incompetent persons to build the piers, he was not liable to the plaintiff (*Feltham v. England*, L. R. 2 Q. B. 33). Where A contracts with B to be supplied with sound road-worthy coaches, and to keep them in repair, and A hires C as driver for one of the coaches, which from a defect breaks down and maims C, he cannot sue his master A, for it was an ordinary risk and he will be without remedy against B also, though B was guilty of negligence, unless there was found on the part of B a knowledge of the defect and of the intention that C should use the coach (*Winterbottom v. Wright*, 10 M. & W. 109).

The plaintiff was a carpenter in the employ of the defendant company, and was standing on a scaffolding at work on a shade close to the line of a railway, and some porters carelessly shifted an engine on a turn-table, and it struck a ladder supporting the scaffold, and thereby the plaintiff was thrown to the ground and injured; it was held that the company was not liable on the ground that whenever an employment in the service of a railway company is such as necessarily to bring the person accepting it into contact with the traffic of the line, risk of injury from the carelessness of those managing that traffic is one of the risks necessarily and naturally incident to that employment (*Morgan v. Vale of Neath Ry.*, *ubi. sup.*; *Lovell v. Howell*, 1 C. P. D. 161).

Where the plaintiff fell into an insufficiently-fenced cooling vat at the defendant's, his employer's, brewery, and it was found that both plaintiff and defendant knew of the defect, it was held that the maxim *volenti non fit iniuria* applied, and therefore the plaintiff could not recover (*Thomas v. Quartermain*, 18 Q. B. D. 685). Where a labourer was killed through the fall of a weight, which he was raising by means of an engine to which he attached it by fastening on a clip, and the clip had slipped off; it was held that although another safer mode of raising the weight was usual and had been discarded by the master's orders, no action lay by his representative against his master (*Dynen v. Leach*, 26 L. J. Ex. 221). A hoarding had been erected by the defendant, a builder, which projected too far into the street, but sufficient room was left for

carts to pass. A heavy machine was placed inside the hoarding and close to it. A cart in passing, struck against the hoarding and knocked down the machine against the plaintiff, a workman in the defendant's employ. The plaintiff had previously made some complaint of the position of the machine to his master, but voluntarily continued to work though the machine was not moved; it was held that the master was not liable (*Alsop v. Yates*, 2 H. & N. 768; *Griffiths v. Gidlow*, 3 H. & N. 648). An accident was caused to a seaman through a defective rope, which was in a proper condition when supplied, but had got frayed through use. Held, that the owners were not responsible to the seaman for the captain (a fellow-workman) not keeping it in repair (*Gordon v. Pyper*, (1892) W. N. 169). Defendants' servant, in the performance of his duties, went down a manhole into the sewer for cleaning a screen. On descending a short distance he was overcome by noxious gas and shouted up to a fellow-workman at the top of the manhole that he felt very faint. His fellow-workman called to him to come up at once, and the deceased man proceeded to ascend the ladder, but after going a few steps fell back into the sewer dead. There were three other men, under the control of an engineer or foreman near at hand. These men on coming up, first one and then the others, went down in turn to the rescue, and all were killed, including the foreman, who went down last. It was contended that the defendant had been guilty of negligence in that there was no cradle or life line to meet any emergency, that the ventilating pipes were allowed to be blocked up, and that the engineer had been negligent in not having tested the air in the manhole; it was held that the defendants were not liable because there was no wrong on their part (*Digby v. E. H. V. D. Council*, 13 T. L. R. 11).

The plaintiff, who was employed by a railway company, was a labourer, and one of the terms of the engagement was that he should be carried by the train from Birmingham where he resided to the spot at which his work for the day was to be done, and be brought back in the evening. The train by which he was returning came into collision with another train, through the negligence of the guard who had charge of it and was injured; it was held, that inasmuch as the plaintiff was being carried, not as a passenger, but in the course of his contract of service, there was nothing to take the case out of the ordinary rule, which exempts a master from responsibility for an injury to a servant through the negligence of a fellow-servant, when both are acting in pursuance of common employment (*Tunney v. M. Ry.*, L. R. 1 C. P. 291; *Hutchinson v. Y. N. & B. Ry.*, 5 Ex. 343). Where two railway companies A and B have a joint-stock of signal-men, and one of them gets injured through the negligence of the private engine-driver of company A, such company will not be liable: for, although the injured man is the servant of A and B, and the engine-driver is the servant of A only, yet they were engaged in a common pursuit so far as company A were concerned, although the signal-man was also engaged in a

further and additional pursuit on behalf of B (*Swainson v. N. E. Ry.*, 3 Ex. D. 341). But where one of the two companies has the user of the other's station, and not the control of its servants employed on such station, one of whom is injured by the negligence of a servant of the company having such right of user, the rule does not apply (*Warburton v. G. W. Ry.*, L. R. 2 Ex. 30; *Turner v. G. E. Ry.*, 33 L. T. 431). Where A contracts with B, to do work on A's premises, as a railway line, and C while employed by and under B is injured in the course of the ordinary traffic on the line, he cannot recover from A, and clearly has no cause of action against B (*Woodley v. Met. D. Ry.*, 2 Ex. D. 384; see *Thrussell v. Handyside*, 20 Q. B. D. 359).

*Indian case.*—Where the plaintiff's husband, a plate-layer in the company's services, died from injuries received in a train he was travelling in while in the defendant's service, the accident being occasioned by the negligence of fellow-servants of the company, it was held that the company was not liable, as there was no failure on their part to provide competent workmen and fit tackle and machinery (*Turner v. S. P. & D. Ry.*, *All. unrep.*).

*Leading cases* :—**Priestly v. Fowler**; **Mellors v. Shaw**.

**Volunteers.**—If a stranger, invited by a servant to assist him in his work, or, who volunteers to assist him, is, while giving such assistance, injured by the negligence of another servant of the same master, he is considered to be a servant *pro tempore*, and no action will lie against the master. The stranger, by volunteering his assistance, cannot impose upon the master a greater liability than that in which he stands towards his own servant (*Degg v. Mid. Ry.*, 1 H. & N. 773; *Potter v. Faulkner*, 1 B. & S. 800). But a person who, having an interest in what the servants are doing, goes not only to help them but also to attend to a matter in which he as well as the defendant is interested, is not in the position of a mere volunteer, and so has not bound himself to undertake the risks of the employment (*Wright v. L. & N. W. Ry.*, 1 Q. B. D. 252).

A railway company contracted to carry a heifer by train. The plaintiff travelled by the same train, and on arriving at the place of destination, he, with the assent of the station-master, assisted to shunt the horse-box, in which the heifer was, in order to hasten delivery and while so doing was injured by the servants of the company. Held, that the company was liable (*Wright v. L. N. W. Ry.*, *sup.*). Where the servants of a railway company were turning a

truck on a turn-table, and a person not in the employment of the company volunteered to assist them, and whilst so engaged, other servants of the company negligently propelled a steam-engine, and thereby caused the death of a person who so volunteered; it was held that the company was not liable (*Degg v. Midland Ry., sup.*). A passer-by who is casually appealed to by a workman for information respecting a thing, which the latter is doing in a public thorough-fare is not to be considered a volunteer assistant so as to exonerate the workman's master from liability (*Cleveland v. Spier*, 16 C. B. N. S. 399).

**Action.**—In all cases, where the servant sues the master for negligence, he must prove that the master knew or ought to have known of the danger, and that the servant did not (*Griffiths v. L. & St. C. D. Co.*, 13 Q. B. D. 259). But contributory negligence by the servant is a defence to an action by him for injury suffered through the negligence of his master (*Weblin v. Ballard*, 17 Q. B. D. 122).

A master, moreover, is not liable to a servant for injuries sustained in the performance of orders which he was not bound to obey, *e. g.*, a servant is not bound to risk his life or limb in obedience to his master's orders (*Smith*, 226).

(2). *The Employers' Liability Act*, 1880.

A very eminent Judge has observed that *Priestly v. Fowler* introduced a new chapter into the law. By far the greatest blow to the practical utility of the employer's Common law liability was dealt by this case. It decided that the principle expressed by the maxim *qui facit per alium facit per se*, of universal application to other relationships, should have no application to the relationship between employer and workmen. The application of this maxim would have rendered an employer responsible to a workman for the negligence of his agents and other workmen engaged in the execution of his work for his profit. In the case of injuries arising out of another servant's negligence, the workmen stood, before the Employer's Liability Act, at a disadvantage as compared with the world outside.

For damage done by the negligence of his servants acting within the scope of their employment, the master, on the principle of *respondeat superior*, was responsible to strangers. But a workman injured by the negligence of a fellow-workman had no such redress (*Thomas v. Quartermain*, 18 Q. B. D 685).

The general scope and object of this Act is to so far expand the employer's responsibility as to make him liable for the negligent acts or default of those to whom he has delegated his duties of control and management and of those whom he has placed in positions of authority over his workmen. Subject to this inroad the doctrine of common employment is allowed to remain as a defence to the employer, with the exception that in the case of railway servants, owing probably to the hazardous nature of their employment, its application is further restricted (*E. L. E.*).

By the Employers' Liability Act, 1880, "a railway servant, or any person to whom the Employers' Workmen Act, 1875, applies," *i. e.*, any labourer, servant in husbandry, journey-man, artificer, handicraftsman, miner, or person otherwise engaged in manual labour "not being a domestic or menial servant, or a seaman" can bring an action against his employer where personal injury is caused to him from any of the following causes:—

1. (1) By reason of any defect in the condition of the ways, works, machinery, or plant, connected with or used in the business of the employer.

(2) By reason of the negligence of any person in the service of the employer who has any superintendence intrusted to him whilst in the exercise of such superintendence.

(3) By reason of the negligence of any person in the service of the employer to whose orders or directions the workman, at the time of injury was bound to conform or did conform, where such injury results from his having so conformed.

(4) By reason of the act or omission of any person in the service of the employer done or made in obedience to the rules or bye-laws of the employer, or in obedience to particular instructions given by any person delegated with

the authority of the employer in that behalf ; or,

(5) By reason of the negligence of any person in the service of the employer who has the charge or control of any signal, points, locomotive engine, or train upon a railway :—

The workman, or, in case the injury results in death, the legal personal representatives of the workman, and any persons entitled in case of death, shall have the same right of compensation and remedies against the employer as if the workman had not been a workman of, nor in the service of, the employer, nor engaged in his work.

2. A workman shall not be entitled under this Act to any right of compensation or remedy against the employer in any of the following cases :—that is to say—

(1) Under sub-section one of the section one, unless the defect therein mentioned arise from, or had not been discovered or remedied owing to the negligence of the employer, or of some person in the service of the employer, and intrusted by him with the duty of seeing that the ways, works, machinery, or plant were in proper condition ;

(2) Under sub-section four of section one unless the injury resulted from some impropriety or defect in the rules, bye-laws, or instructions therein mentioned ; provided that where a rule or bye-law has been approved or has been accepted as a proper rule or bye-law by one of Her Majesty's principal Secretaries of State, or by the Board of Trade, or any other department of the Government, under or by virtue of an Act of Parliament, it shall not be deemed for the purposes of this Act to be an improper or defective bye-law ;

(3) In any case where the workman knew of the defect or negligence which caused him injury, and failed within a reasonable time to give, or cause to be given, information thereof to the employer, or some person superior to himself in the service of the employer, unless he was aware that the employer, or such superior, already knew of the said defect or negligence.

The sum recoverable as compensation is limited to three years' average earnings (s. 3). The injured servant or his representatives, must give notice (stating the cause of injury and the date at which it was sustained—s. 7) of his claim to the employer within six weeks of the accident, unless in the case of death, the judge thinks there was reasonable excuse for not giving it. Money payable under penalty is to be deducted from compensation under the Act (s. 5). The action must be brought in a county Court but may be removed into a superior Court (s. 6). The action must be commenced by the injured servant within six months, or



by his personal representatives (if he is killed) within twelve months (s. 4).

The master may rely by way of defence, (1) on contributory negligence, (2) on the maxim *volenti non fit injuria*, (3) on any contract by which the workman has contracted himself out of the Act (*Griffiths v. Lord Dudley*, 9 Q. B. D. 357). But he cannot set up in cases under the Act, the defences available at Common law, *viz.*, (1) common employment, (2) that the servant has undertaken the risk and (3) contributory negligence.

This Act has not in any way affected the application of the maxim *volenti non fit injuria*; and if a man voluntarily undertakes with his eyes open exceptional risks incident to an employment, he cannot recover in respect of injuries arising thence, unless his employer has been guilty of a breach of duty, such as that referred to in the proviso to section 1.

When a workman engaged in an employment not in itself dangerous is exposed to danger arising from an operation in another department over which he has no control—the danger being created or enhanced by the negligence of the employer—the mere fact that he undertakes or continues in such employment with full knowledge and understanding of the danger is not conclusive to show that he has undertaken the risk so as to make the above maxim applicable in case of injury. The question whether the servant has so undertaken a risk as to bring himself within the maxim is one of fact and not of law. This is so both at Common law and in cases arising under the Employers' Liability Act, 1880 (*Smith v. Baker*, (1891) A. C. 325). In order that a man may be *volens* "mere knowledge of the danger will not do; there must be an assent on the part of the workman to accept the risk with a full appreciation of its extent, to bring the workman within the maxim" (per

Lord Esher, M. R., in *Yarmouth v. France*, 19 Q. B. D. 647). The mere fact that a man knew of a danger and yet incurred it, is not conclusive that he incurred it willingly within the meaning of the maxim (*Thomas v. Quartermain*, 18 Q. B. D. 685). A workman who never in fact engaged to incur a particular danger, but who finds himself exposed to it, and complains of it, cannot be held as a matter of law to have impliedly agreed to incur that danger or to have voluntarily incurred it because he does not refuse to face it (per Lindley, L. J., in *Yarmouth v. France*, *sup.*). But Lord Herschell goes further in *Smith v. Baker*, and says that where a servant has been subjected to risks owing to a breach of duty on the part of his employer, the mere fact that he continues his work, even though he knows of the risk and does not remonstrate, does not preclude his recovering in respect of the breach of duty by reason of the doctrine *volenti non fit injuria*.

The defence arising from this maxim is not applicable to cases where the injury arises from the breach of a statutory duty on the part of the employer (*Baddeley v. Granville*, 19 Q. B. D. 423; *Smith*, 222).

(3). *The Workmen's Compensation Acts, 1897 & 1900.*

The Act of 1897 is supplemental to the Employers' Liability Act, 1880. The principle upon which it is based is entirely new. It introduces a liability not founded upon any breach of duty, either at Common law or statutory. The employer is to be henceforth an insurer against accidents which occur in the course of the execution of his work, and is to pay a limited compensation in respect of accidents, whether due to want of care on his part or on the part of his servants or not. The measure being a tentative one is applied to part only of the industries of England.

The right of the workmen included in this Act, if they prefer it, to sue under the Employer's Liability Act, or at Common law, is preserved. An employer is not to be liable to pay compensation both under this Act and independently of it.

It will never be worth while for the representatives of workmen killed by accident to bring an action, the damages to which they are entitled under this Act being equal to the maximum allowed to be given under the Employers' Liability Act, 1880.

In one case only is the compensation given by the Act to be disallowed. This case is where the injury is attributable to the workman's own serious and wilful misconduct (s. 1 (2) (c)).

Only those classes of workmen named in the Act are entitled to compensation under it (s. 7).

All questions as to liability to pay compensation under this Act, and the amount and duration of the compensation, including any question as to whether or not the employment is one to which this Act applies, are to be settled by arbitration (s. 1, sub-s. 3). No action at law can be brought to decide them, or any of them.

The requirements of notice are similar to the Employer's Liability Act, 1880.

The employer and his workmen can contract themselves out of this Act only if the contract provides a scheme of compensation.

Where the workman is injured in the course of his employment under circumstances creating a legal liability in some person other than the employer, the workman can either proceed at law against such person, or claim his compensation under this Act, but he cannot do both.

By the Workman's Compensation Act of 1900, the provisions of the Act of 1897 have been extended "to the

employment of workmen in agriculture by any employer who habitually employs one or more workmen in such employment" (s. 1).

(4). LIABILITY OF SERVANT TO MASTER.

A servant is, no doubt, liable to his master, though not to others, for the consequences of his non-feasances or wrongful omissions. If damages have been recovered from the master by reason of the servant's negligence in doing the master's work, or in executing his orders, these damages may be recovered by the master from the servant (*Green v. New River Co.*, 4 T. R. 590).

II. *Owner and Independent Contractor.*

One employing another is not liable for his collateral negligence, unless the relation of master and servant existed between them (*Dalton v. Angus*, 6 App. Cas. 740). Thus, if an independent contractor is employed to do a lawful act, and in the course of the work he or his servants commit some casual act of wrong or negligence, the employer is not answerable (*Pickard v. Smith*, 10 C. B. N. S. 470). Such negligence is sometimes called casual or collateral negligence.

An **independent contractor** is one who undertakes to produce a given result, without being in any way controlled as to the method by which he attains that result. In the actual execution of the work he is not under the order or control of the person for whom he does it, but uses his own discretion in things not specified beforehand. He who controls the work is answerable for the workman; the remoter employer who does not control is not answerable when work which can lawfully be done without injury to others is placed in the hands of a contractor. The test whether a man employed to do work is a servant or an in

dependent contractor is the question : does the employer exercise, or has he right to exercise, control over the workman (*Martin v. Temperley*, 4 Q. B. 298), and direct him *how to do his work*? (*Sadler v. Hemlock*, 5 El. & Bl. 570; *Ruth v. Surrey Com. Dock Co.*, 8 T. R. 116). If so, the relation is that of master and servant.

The principle—*respondeat superior*—does not extend to make an employer responsible for the unlawful act of a person, not in his service, with whom he has contracted to do the work, in the course of which the default occurred (*Allen v. Hayword*, 7 Q. B. 960). A person who employs another to do a lawful act is presumed, in the absence of evidence to the contrary, to employ him to do it in a lawful and reasonable manner (*Butler v. Hunter*, 7 H. & N. 826).

Employer's right to inspect works, to decide as to the quality of materials and workmanship, to stop the works or any part thereof at any stage, to modify and alter them, and to dismiss disobedient or incompetent workmen employed by the contractor, will not thereby render himself liable to third persons for the negligence of the contractor in carrying out the works (*Reedie v. L. & N. W. Ry.*, 4 Ex. 244; *Steel v. S. E. Ry.*, 16 C. B. 550; *Hardaker v. Idle Dis. Council*, (1896) 1 Q. B. 335; *Glover v. L. & N. W. Ry.* 5 Ex. 66).

Some bales of cotton were insecurely piled in a warehouse by cotton porters acting under the control of the warehouse-keeper, but in the employ of the defendant, a cotton merchant, to whom the bales belonged. The plaintiff, being lawfully in the warehouse to re-canvas the bales of another cotton merchant, was injured by the fall of one of the defendant's bales. Held, that the defendant was responsible (*Murphy v. Caralli*, 3 H. & C. 462). A labourer, particularly skilful in making drains, who was employed to cleanse a drain for the defendant, who paid him five shillings for the job, was held not to be a contractor, and the defendant was held liable for injuries caused through the labourer's negligence (*Sadler v. Henlock*, 4 E. & B. 570).

**Exceptions.**—There are five exceptions to the rule that a person employing a contractor is not liable for his (con-

tractor's) wrongful acts :—

1. Where the employer retains his control over the contractor, and personally interferes and makes himself a party to the act which occasions the damage (*Burgess v. Gray*, 1 C. B. 578).

2. Where the thing contracted to be done is itself illegal (*Ellis v. Sheffield Gas Co.*, 2 E. & B. 767; *Angus v. Dalton*, 6 Ap. Cas. 740).

3. Where a legal or statutory duty is incumbent on the employer to carry out a particular work efficiently, and the contractor either omits or imperfectly performs such duty (*Hole v. Sittingbourne Ry.*, 6 H. & N. 488; *Grey v. Pullen*, 5 B. & S. 970; *Hardaker v. Idle Dis. Council*, (1896) 1 Q. B. 335; *The Snark*, (1900) P. 105; *Maxwell v. British Thomson Houston Co.*, 18 T. L. R. 278).

Where person employs a contractor to do work in a place where the public are in the habit of passing, which work will, unless precautions are taken, cause danger to the public, an obligation is thrown upon the person who orders the work to be done to see that the necessary precautions are taken, and that, if the necessary precautions are not taken, he cannot escape liability by seeking to throw the blame on the contractor (*Penny v. Wimbledon Urban Council*, (1899) 2 Q. B. 76). A person who is engaged in the execution of dangerous works near a highway cannot avoid liability by saying that he has employed an independent contractor, because it is the duty of a person who is causing such works to be executed to see that they are properly carried out so as not to occasion any damage to persons passing by on the highway (per Smith, L. J., in *Holliday v. National Telephone Co.*, (1899) 2 Q. B. 400).

4. Where the thing contracted to be done, although lawful in itself, is likely, in the ordinary course of events, to damage another's property unless preventive means

are adopted, and the contractor omits to adopt such means (*Hughes v. Percival*, 8 App. Cas. 443; *Bower v. Peate*, 1 Q. B. D. 321; *Angus v. Dalton*, *sup.*), *e. g.*, injury to neighbouring houses by pulling down property. To escape liability in such cases the employer must show that the contractor was not acting within the scope of his contract, but was a trespasser when he did the act complained of (*Black v. Christchurch Finance Co.*, (1894) A. C. 48).

5. Under section 4 of the Workmen's Compensation Act 1897, if "undertakers" employ a contractor, such contractor's servants can recover compensation from the "undertakers," who in their turn have a right to be indemnified by the contractor (*Cooper & Crane v. Wright*, (1902) A. C. 302).

**Exception 1.**—Where the defendant employed a contractor to make a drain, and he left some of the soil in the highway, in consequence of which an accident happened to the plaintiff, and afterwards the defendant, on complaint being made, promised to remove the rubbish, and paid for carting part of it away, *and it did not appear that the contractor had undertaken to remove it*; it was held that the defendant was liable (*Burgess v. Gray*, 1 C. B. 578). Under a contract to discharge a ship the whole work was not to be done by the stevedores, but the shipowners were to control and employ members of the crew to work the tackle. Held, that the shipowners were liable for injury to a servant of the stevedores occasioned by the negligence of a winchman who was a member of the crew and not in the employ nor under the control of the stevedores (*Union S. Co. v. Claridge*, (1894) A. C. 185).

**Exception 2.**—A gas company, not authorized to interfere with the streets of Sheffield, directed their contractor to open trenches therein, the contractor's servant in doing so, left a heap of stones, over which the plaintiff fell and was injured; it was held that the defendant company was liable, as the interference with the streets was in itself a wrongful act (*Ellis v. Sheffield Gas Co.* 23 L. J. Q. B. 42; 2 E. & B. 767).

**Exception 3.**—Where the defendants were authorized, by an Act of Parliament, to construct an opening bridge over a navigable river, and the plaintiff having suffered loss through a defect in the construction and working of the bridge, it was held that the defendants were liable, and could not excuse themselves by throwing the blame on their contractor (*Hole v. Sittingbourne Ry.*, 6 H.

& N. 486). The occupier of the refreshment room at a railway station was held liable for an injury caused by the trap of his coal-cellar being negligently left open by the servants of the coal-merchant who had been delivering coal there (*Pickard v. Smith*, 10 C. B. N. S. 470). But in another case the coal merchant was held liable (*Whitely v. Pepper*, 2 Q. B. D. 276). A person maintaining a lamp projecting over a high way for his own purposes is bound to maintain it so as not to be dangerous to passengers, and if it causes injury owing to want of repair it is no answer on his part that he employed a competent person to put it in a safe state of repair (*Tary v. Ashton*, 1 Q. B. D. 314). A contractor employed to make a sewer, negligently omitted to keep a gas pipe properly supported during excavations so that it broke and the gas escaping caused injury to the plaintiff. Held, that his employers, though acting under statutory authority, were responsible (*Hardaker v. Idle Dis. Council*, (1896) 1 Q. B. 335). A contractor was employed to make up a road, and in carrying out the work, he negligently left on the road a heap of soil unlighted and unprotected. A person walking along the road after dark fell over the heap and was injured. Held, that his employers, though acting under statutory authority to make the road, were liable, because, from the nature of the work which they had employed the contractor to do, danger was likely to arise to the public using the road (*Penny v. Wimbledon Ur. Coun.*, (1899) 2 Q. B. 72). Defendants employed a contractor to make up a road. Plaintiff was driving on the road and was seriously injured by being jolted against a girder of a railway bridge owing to a ridge having been left in the road. The defendants were held liable although the injury was caused by the neglect of the contractor (*Hill v. Tottenham*, 106 L. T. 127). A company was laying telephone wires underneath the pavement of a street and contracted with a plumber to solder the joints of the pipes in which the wires were laid. To do this the soldering material was melted in an iron pot put on the pavement, and in accordance with a common and proper practice a benzoline lamp was dipped into the molten metal for the purpose of getting a flare. In consequence of the negligent way in which this was done, an explosion ensued and the plaintiff, who was passing along the high way, was injured. The district council was held liable, as they were bound to take care that the public using the highway were protected against any act of negligence by a person acting for them in execution of the works (*Holliday v. National Tele. Co.*, (1899) 2 Q. B. 392). A barge of defendants was sunk in the Thames. They employed an underwaterman to raise her: but owing to the guard-vessel placed by him, with lights upon it, to mark the submerged barge, having been negligently allowed to get out of position, the plaintiff's steamship coming up the river, without negligence, ran upon the wreck and sustained damage. Held, that the defendants were personally responsible, and could not escape the liability by throwing the blame on the contractor (underwaterman) employed by them to



do the work (*The Snark*, (1900) P. 105 ; *The Utopia*, (1893) A. C. 492).

*Indian cases.*—The plaintiff claimed to recover Rs. 63,500 for damages sustained by him in consequence of his having fallen into a hole dug on the land of the first defendants, by an *employe* of the second defendant. The plaintiff occupied a house near the land and had been in the habit of crossing the land daily in going to and from his place of business. There was a regularly constructed road from his house to the high road, which he might have used, but, as a short cut, he and others were in the habit of using the beaten track across the land. No express permission had ever been given to any of the persons who were in the habit of using it. On one day the plaintiff had gone to his place of business as usual by the short cut across the land : while returning at about 11 o'clock at night he fell into a hole which had been dug during the day right across the pathway by the *employe* of the second defendant, for the purpose of ascertaining the suitability of the soil for building purposes, for which purposes the second defendant had obtained an agreement to lease the land from the first defendants. The hole was several feet deep and was unfenced and unlighted. Held, that there had been negligence on the part of the *employe* of the second defendant, for which the second defendant alone was liable ; and a sum of Rs. 17,000 was awarded as damages (*Evans v. Trustees of the Port of Bombay & Sirdar Dilar Dowlat*, 11 Bom. 329).

Plaintiff was driving a buggy along a street in Calcutta by night and fell into a hole opened in the road, which was left unfenced and insufficiently lighted, and had been badly injured. It appeared that the road had been opened by an engineer in the employment of the Government, who had applied to and obtained permission from the corporation to open the road, subject to the condition that he employed one of the contractors licensed by the Municipality to do such works, and such a contractor had been employed. The plaintiff sued for damages, making the Secretary of State, the corporation, and the contractor, defendants. It was held that the Secretary of State was not liable, because he came within the established rule that one who employs another to do what is perfectly legal must be presumed to employ that other to do this in a legal way ; that the Corporation who had a statutory obligation imposed upon them to repair and maintain the roads were liable to the plaintiff for a breach of their statutory duty ; that where there was a dangerous obstruction, and *a fortiori* where such dangerous obstruction resulted from a permission granted by the Commissioners, they were liable for damages caused by it ; and that the contractor also was liable (*Corporation &c. of Calcutta v. Anderson*, 10 Cal. 445). The Municipal Committee of Lahore, having resolved to repair a certain public road within the limits of the Municipality employed a contractor to perform the work. Though, in order to avoid danger to persons driving along the road at night, it was necessary that the road should be lighted, the contractor negligently omitted to light the road at night while under repair, and in consequence of his

omission the plaintiff, while driving along the road, sustained damage. Held, that the Municipal Committee was liable for the negligence of the contractor, and was bound to make good to the plaintiff the damage he had sustained (*Keough v. Municipal Committee of Lahore*, P. R. 108 of 1883).

**Exception 4.—Defendant liable.**—Where defendant employed a contractor to pull down an old house and erect a new one; and the contractor expressly undertook to support the plaintiff's house, and to be liable for all damage, it was held that the defendant was liable for the damage (*Bower v. Peate*, 1 Q. B. D. 321; *Le Maitre v. Davis*, 19 Ch. D. 281). Defendant employed a contractor to take down his house and rebuild it. In doing this the contractor negligently cut into the party-wall between the defendant's house and the adjoining house of B, and this caused the defendant's house to fall and do damage to the plaintiff's house. There was no question whether the plaintiff had any right of support from the defendant's house. Held, that the defendant was liable, upon the ground that the work ordered by him was necessarily attended with risk to the plaintiff's house, and that it was therefore the defendant's duty to see that proper precautions were taken to prevent injury to that house (*Hughes v. Percival*, 8 App. Cas. 443, overruling *Butler v. Hunter*, 7 H. & N. 826). Defendants, landowners, contracted with a man to fell and to burn bush on their land, and they made certain stipulations as to the time when the burning was to take place. The contractor disregarded these stipulations and negligently made a fire which spread to the plaintiff's land and injured his buildings and crops. Held, that the defendants were liable (*Black v. Christchurch F. Co.*, (1894) A. C. 48).

*Indian case.*—The plaintiffs were owners of a house consisting of a ground floor and upper story and measuring 77 feet in length. On the south side of the house was a gully, 3 feet and 6 inches wide, separating it from another upper-storied house. The plaintiffs in this suit complained that in January 1891 the defendant by his servants dug a trench, 8 feet deep, along the whole length of the gully for the purpose of laying a drain pipe, and that the work was done so negligently that the plaintiffs' house was injured and became in such a dangerous condition that it had to be pulled down. The plaintiffs claimed Rs. 3,996 as damages. The defendant denied the negligence, and alleged that the work was not done by his servants or agents, but by a contractor. Held, that the defendant was liable for the act of his contractor. The work was necessarily attended with risk, and the defendant could not free himself from liability by employing a contractor. The defendant as well as the contractor were liable to the plaintiffs (*Dhondiba v. Mun. Commrs. of Bombay*, 17 Bom. 307).

**Defendant not liable.**—Two ladies, being possessed of a carriage of their own, were furnished by a job-master with a pair of horses and a driver by the day to drive. They gave the driver a gratuity for each day's drive, and provided.

him with a livery hat and coat, which were kept in their house; and, after he had driven them constantly for three years, and was taking off his livery in their hall, the horse started off with the carriage, and inflicted an injury upon the plaintiff. It was held that the ladies were not responsible, as the coachman was not their servant, but the servant of the job-master (*Quarman v. Burnett*, 6 M. & W. 499).

Where a company, empowered by an Act of Parliament to construct a railway, contracted under seal with certain persons to make a portion of the line, and by the contract reserved to themselves the power of dismissing any of the contractor's workmen for incompetence, and the workmen, in constructing a bridge over a highway, negligently caused the death of a person passing beneath along the highway, by allowing a stone to fall upon him, it was held, in an action against the company by the administratrix of the deceased, that they were not liable (*Reedie v. L. & N. W. Ry.*, 4 Ex. 344). A person who erects a building by contract and employs a clerk of the works to superintend the erection, is not liable for injury to a workman in the building by reason of its negligent construction, unless he personally interfered, or negligently appointed an incompetent clerk of the works, with knowledge of his incompetency (*Brown v. Accrington Cotton Sping. Co.*, 3 H. & C. 511). The owner of a ship who employed a master stevedore to execute the work of unloading the vessel was held not liable for the negligence of a man employed by the stevedore, though the man, being one of crew, was the defendant's general servant (*Murray v. Currie*, L. R. 6 C. P. 24).

Where a butcher bought a bullock and employed a *licensed* drover to drive it home, and the drover employed a boy, through whose negligence the bullock injured the plaintiff's property; it was held that the butcher was not liable as the drover exercised a distinct calling, and the boy who caused the mischief was his servant, not the servant of the butcher (*Milligan v. Wedge*, 12 A. & E. 737).

A contractor employed by navigation commissioners, in the course of executing the works, flooded the plaintiff's land, by improperly, and without authority, introducing water into a drain insufficiently made by himself, it was held that the contractor was liable and not the commissioners (*Allen v. Howard*, 7 Q. B. D. 260).

*Indian case.*—In a suit for alleged damage done to the plaintiff's premises by excavations for drainage purposes, which the defendants were authorized to make by Beng. Act VI of 1836, it being shown that the defendant Justices had entrusted the execution of the work to skilled and competent contractors; it was held that the Justices were not liable (*Ullman v. The Justices of the Peace of Calcutta*, 8 B. L. R. 265).

*Leading cases.*—*Quarman v. Burnett*; *Reedie v. L. & N. W. Ry.*

**Sub-contractor.**—If one contracts for the performance

of an entire work, and then sub-contracts for a portion of the entire work, and that is done under the immediate control and superintendence of the sub-contractor, the latter is alone liable for any wrong done by his workmen (*Story*).

A builder was employed to make certain alterations in a club-house. He sublet to a gas-fitter the work of preparing the gas-fittings. In consequence of the negligence of the latter or of his servants, the gas exploded and injured the plaintiff. It was held that the plaintiff's remedy was against the gas-fitter and not against the builder (*Rapson v. Cubitt*, 4 M. & W. 710). A had contracted with parish officers to pave a certain district, and made a sub-contract with B, by which the latter was to lay the paving of a certain street with materials to be furnished by A. Preparatory to paving, the stones were laid by servants of B on the path-way and there left in such a manner as to obstruct the same. C fell over them and broke his leg. It was held that C could not maintain an action against A as the injury was not caused by *his* workmen (*Overton v. Freeman*, 11 C. B. 867). A sub-contractor, was, for some purposes, the servant of defendant. The defendant had employed him as his general servant and surveyor; and he had the management of the defendant's business, for which he received an annual salary. In this particular case the defendant engaged him by contract for £40 to erect a scaffold, which had become necessary in building a bridge; and the defendant was to furnish materials. It was held that the defendant was not liable for damages sustained by reason of the negligence of his sub-contractor's workmen (*Knight v. Fox*, 5 Ex. 721).

### III. *Principal and Agent.*

#### I. LIABILITY OF PRINCIPAL.

The law upon this subject is founded upon the same analogies as exist in the case of masters and servants.

In order that responsibility may attach to the principal, in respect of a tortious or fraudulent act—whether criminal or not (*Dyer v. Munday*, (1895) 1 Q. B. 742)—it is necessary: (1) that he shall have authorized it in the first instance; or (2) that it shall have been done on his behalf and he shall have ratified it (*Wilson v. Tummam*, 6 M. & G. 236; *Marsh v. Joseph*, (1897) 1 Ch. 214); or (3) that it shall have been committed for his benefit by the agent in the course and as part of his employment (*Burns v. Poul-*

son, L. R. 8 C. P. 536), even though he has expressly forbidden it (*Collman v. Mills*, (1897) 1 Q. B. 396). That this last is sufficient is obvious from those cases in which masters have been held liable for the negligence of their servants (*Patter v. Rea*, 2 C. B. N. S. 606); litigants, for irregularities committed by their solicitors in the course of litigation to conduct which they are retained (*Collett v. Foster*, 2 H. & N. 365); merchants, for frauds committed by their factors and brokers whilst acting on their behalf (*Hern v. Nichols*, 1 Salk. 289); and shopkeepers, for the wrongful acts of their shopmen whilst in the shop and attending to its business (*Grammar v. Nixon*, 1 Str. 653).

The principal is not liable for the torts of his agent, except upon one or other of the three above-mentioned grounds. Thus, a principal is not liable for the wilful acts of his agent, if not done in the course of his employment and as part of his business (*McManus v. Crickett*, 5 R. R. 518; *Croft v. Alison*, 4 B. & A. 590); and this is true not only of assaults, batteries, libels, and the like, but also of frauds. The maxim *respondeat superior* does not render a principal liable for the frauds of his agent, if the agent has been dealt with as a principal (*Ex parte Eyre*, 1 Ph. 227); nor unless the frauds have been committed by the agent for the benefit of his principal, and in the course, and as part of his own employment (*Grant v. Norway*, 10 C. B. 665; *Coleman v. Riches*, 16 C. B. 104; *Barwick v. Joint Stock Bank*, 2 Ex. 259; *Blake v. A. L. Ass. Society*, 4 C. P. D. 94; *Swire v. Francis*, 3 App. Cas. 106; *British Mutual Bank v. Charnwood F. Ry.*, 18 Q. B. D. 714; *Thorne v. Heard*, (1895) A. C. 495; *Weir v. Bell*, 3 Ex. D. 238).

**Criminal acts of agents.**—The fact that the wrongful act is a felony does not constitute any defence (*Osborne v. Gillett*, L. R. 8 Ex. 88). Thus, if an agent, in the ordinary course of his employment on the principal's behalf,

commits a trespass (*Hatch v. Hale*, 15 A. & E. 10), or infringes a patent or trade-mark (*Betts v. De Vitre*, L. R. 3 Ch. 429; *Tonge v. Ward*, 21 L. T. 480), or wrongfully converts the goods or chattels of a third person, by refusing to deliver them up to him on demand (*Giles v. Taff. Vale Ry.*, 2 El. & Bl. 822; *Yarborough v. Bank of England*, 16 East 6), or by selling or otherwise disposing of them without his authority (*Tronson v. Dent*, 8 M. P. C. 419; *Ewbank v. Nutting*, 7 C. B. 797; *Carman v. Meaburn*, 1 Bing. 243), the principal is civilly liable for the trespass, infringement, or conversion, even if he did not authorise it, to the same extent as he would have been if he had committed the wrong himself.

**Liability.**—The liability of a principal for the wrongs of his agent is a joint and several liability with the agent. The injured party may sue either or both of them, but if he chooses to sue the agent alone, and recovers judgment against him, such judgment, though unsatisfied, is a bar to any proceedings against the principal (*Brinsmead v. Harrison*, L. R. 7 C. P. 547; *Wright v. L. G. O. Co.*, 2 Q. B. D. 271).

## 2. LIABILITY OF AGENTS.

Agents	Private	{ for acts of misfeasance or positive wrongs—personally liable to third persons.
		{ for acts of non-feasance or mere omissions of duty—not liable to third person, but solely to his principal.
	Public	{ for malfeasance, misfeasance, non-feasance, &c—personally liable to third persons, the Government being in no case liable.

**1. Private agents.**—The agent is personally liable to third persons for his own misfeasance and positive wrong (*Bell v. Josleyn*, 3 Gray 309; *Lane v. Cotton*, 12 Mod. 488), whether he did the wrong intentionally or ignorantly by

the authority of his principal and for his benefit; or for his own benefit. But he is not, in general (for there are exceptions), liable to third persons for his own non-feasances, or omissions of duty, in the course of his employment. His liability, in these latter cases, is solely to his principal; there being no privity between him and such third persons, but the privity exists only between him and his principal. And, hence, the general maxim as to all such negligences and omissions of duty, is, in cases of private agency, *respondeat superior* (*Story*).

If goods are delivered by the owner to A to keep, but if he delivers them to B to keep for the use of A, and B wastes or destroys them, the owner may have an action for the tort against B, although the bailment was not made to him by the owner; for B is a wrong-doer (1 Roll. Abr. 90). If A delivers his horse to a black-smith, and he delivers him to another black-smith, who wantonly lames him, A may have an action against the latter notwithstanding A did not authorize the bailment, for he is a wrong-doer (*ibid*).

If the servant of a common carrier negligently loses a parcel of goods, intrusted to him, the principal, and not the servant, is responsible to the bailor or the owner (*Lane v. Cotton*, 12 Mod. 488). If the servant of a black-smith so negligently conducts himself in shoeing a horse that the horse is consequently injured, or afterwards becomes lame, the master and not the servant, will be liable for the negligent injury (1 Bl. Com. 431). But, if the servant, in shoeing a horse, has pricked him, or has maliciously and wantonly lamed him, an action will lie personally against the servant himself (*Story*).

If the principal is a wrong-doer, the agent, however innocent in intention, who participates in his acts, is a wrong-doer also. Thus, if the agent of a merchant who has received goods from a bankrupt after a secret act of bankruptcy, should, pursuant to orders from his principal, sell the goods, an action of trover would lie in favour of the assignees against the agent, however ignorant he might be of the defect of title; for a person is guilty of a conversion who intermeddles with the property of another without due authority from the true owner; and it is no answer that he acted as an agent, under the authority of a person supposed at the time to be entitled as the owner (*Stevens v. Elwall*, 5 M. & S. 259).

There is one important exception to the rule already stated as to non-liability of agents to third persons for the negligence and omissions of duty of themselves and of their sub-agents, founded upon the principles of maritime law.

It is the case of masters of ships who, although they are the agents or servants of the owners, are also, in many respects, deemed to be responsible, as principals, to third persons, not only for their own negligences and misfeasances, but also for the negligences, non-feasances and misfeasances of the subordinate officers and others employed by and under them.

2. **Public agents.**—It is plain, that the Government itself is not responsible for the misfeasances or wrongs, or negligences or omissions of duty, of the subordinate officers or agents employed in the public service; for it does not undertake to guarantee to any persons the fidelity of any of the officers or agents whom it employs; since that would involve it, in all its operations, in endless embarrassments, difficulties and losses, which would be subversive of the public interests; and, indeed, laches are never imputable to the Government (*Seymoure v. Van Slyek*, 8 Wend. 403; *United States v. Kirkpatrick*, 9 Wheat. 920). And the public officers and agents are not responsible for the misfeasances, or positive wrongs, or for the non-feasances, or negligences or omissions of duty, of the sub-agents, or servants, or other persons properly employed by or under them, in the discharge of their official duties, such as the Postmaster-General, the Lords Commissioners of the Treasury, the Commissioners of Customs and Excise, the Auditors of the Exchequer, &c. (*Smith v. Powditch*, Cowp. 182; *Whitfield v. Le De Spenser*, Cowp. 754; *Rowning v. Goodchild*, 2 W. Bl. 906; *Mersey D. T. & H. B. v. Gibbs*, L. R. 1 H. L. 124). But such subordinates shall be held *personally* responsible to third persons (*Story*).

Again, a public officer will not be exempted from responsibility for the act of one who is his *own* servant (*Lord North's case*, Dyer 161; *Boson v. Sandford*, 3 Mod. 321).



## 3. RIGHTS OF AGENTS AGAINST THIRD PERSONS.

The remedy of agents against third persons in tort, as a general rule, are confined to cases where the right of possession is injuriously invaded, or where they incur a personal responsibility, or loss, or damage in consequence of the tort (*Story*). Thus, where an agent has actual possession of property belonging to his principal, he may maintain an action for any tort, committed by a third party, whereby such possession is affected (*Fowler v. Down*, 1 B. & P. 47). Where goods have been bailed, and a third person wrongfully deprives the bailee of the use or possession of them, or does them any injury, the bailee is entitled to bring a suit for such deprivation or injury (I. C. A. s. 180).

IV. *Company and Director.*

## I. LIABILITY OF COMPANY.

Although companies are seldom created to do what is wrong, and can seldom be said to have in fact authorized the wrongful acts of their directors or servants, it is plain that the ordinary principles of agency apply to companies; and on these principles, companies are liable for the negligence of their servants, and for torts committed by them in the course of their employment; and it never has been admitted, as a sufficient reason for non-liability on the part of the company, that it did not in fact authorize the very act complained of. All that is necessary to charge the company is that the act complained of should be *intra vires*, and not *ultra vires*, and should be committed for the company by its agent or servant in the course of the business to which it is his duty to attend, or as it is sometimes expressed, in the course and as part of his employment (*Lindley*, i. 257).

Upon this principle it has been held that the Bank of England is liable for a wrongful detention of bank-notes by its servants (*Yarborough v. Bank of England*, 16 East 6); that a banking company is liable for the loss of securities

entrusted to it and carelessly kept (*Johnston's claim*, 6 Ch. D. 212); that a company is liable for a wrongful seizure of goods made by its servants for non-payment of tolls (*Maud v. Monmouthshire Canal Co.*, 4 M. & G. 452; *Smith v. Birmingham Gas Co.*, 1 A. & E. 523); for wrongful assaults (*Butler v. M. & S. Ry.*, 21 Q. B. D. 207) and arrests if made by persons authorized to act for the company in removing persons or giving them into custody (*Moore v. M. Ry.*, L. R. 8 Q. B. 36); for negligence in laying down gas-pipes (*Scott v. Mayor of Manchester*, 1 H. & N. 59); for reckless driving (*Green v. London General Omnibus Co.*, 7 C. B. N. S. 290; *Limpus v. L. G. O. Co.*, 1 H. & C. 526); for the infringement of a patent by its servants contrary to the orders of its directors (*Betts v. Devitre*, 3 Ch. 441); and for the publication of a libel by transmitting it by telegraph (*Whitfield v. S. E. Ry.*, E. B. & E. 115; *Lawless v. Anglo Egyptian &c., Co.*, L. R. 4 Q. B. 262); or dictating it to a copying clerk (*Pullman v. Walter Hill & Co.*, (1891) 1 Q. B. 524). Moreover, in such cases, as those now in question, it is not necessary, in order to fasten liability on the company to prove any formal appointment of the agent by the company (*Giles v. Taff Vale Ry.*, 2 E. & B. 822; *Lindley*, i. 258).

It is, however, essential in order that a company may be liable for the wrongful acts of its servants that those acts should be such as the company could have authorized, and that they should have been authorized or ratified by the company, or have been done by the servants in the course of their employment, and not when acting in matters to which it is not their duty to attend (*Lindley*, i. 259).

A company was not held liable for injuries committed by a dog kept in a yard, there being no evidence to show that the savage nature of the dog was known to any one who had charge of it, nor to the company's manager, nor, in fact, to any one whose knowledge could be considered as the knowledge of the company, although it was proved to be known to one or two of its servants (*Styles v. C. S. B. Co.*, 4 N. R. 483).

## 2. PERSONAL LIABILITY OF DIRECTORS.

Directors are personally responsible for any torts which they may themselves commit or direct others to commit, although it may be for the benefit of their company (*Mill v. Hawker*, L. R. 9 Ex. 309). In a recent case where a company had been formed, and registered under a name calculated to deceive, for the fraudulent purpose of obtain-

ing the benefit of another trader's name and reputation, the directors, who were the seven signatories and sole shareholders of the company, were held liable for the fraud, and an injunction was granted to restrain them from allowing the company to remain registered under that name (*La Societe A. L. v. Panhard L. & Co.*, (1901) 2 Ch. 513). It was held in a case in which a company infringed a patent, that the directors were personally liable for the costs of a suit to restrain the infringement (*Betts v. De Vitre*, 5 N. R. 165). But it would be contrary to principle to hold directors personally responsible for the negligent or other acts of other servants of the company, unless the directors are themselves personally implicated in such act (*Lindley*, i. 348).

### V. *Firm and Partner.*

The relation of partners *inter se* is that of principal and agent, and therefore each partner is liable for the acts of his fellows. Every partner is liable to make compensation to third persons in respect of loss or damage arising from the *neglect* or *fraud* of any partner in the management of the business of the firm (I. C. A. s. 250). The neglect or fraud complained of must have been committed in the ordinary course of the partnership business; and while he is acting within the scope of his authority. The fact of the co-partner's complete innocence and non-participation in the fruits of the fraud is irrelevant. But if the transaction is unconnected with the firm's business, or if the fraud is committed while the partner is not acting as a member of the firm, the loss occasioned cannot be thrown upon the innocent members of the firm. Thus, if one partner by fraud induces a person to join the firm, such fraud cannot be imputed to the firm, unless he had authority to find another partner. A fraud committed by a partner whilst acting on his own

separate account is not imputable to the firm, although had he not been connected with the firm he might not have been in a position to commit the fraud.

A partnership is liable for the negligence of its servants acting in the course of their employment by the firm (*Staples v. Eley*, 1 C. & P. 614). A firm of coach-proprietors is answerable for the negligent driving of a partnership coach of one of the firm, the coach being driven for the firm in the ordinary course of business (*Moreton v. Hordern*, 4 B. & C. 223; *Steel v. Lester*, 3 C. P. D. 121); and two partners are liable for not keeping the shaft of a mine in proper order, although one of them only actually superintended it (*Mellors v. Shaw*, 1 B. & S. 43; *Ashworth v. Stanwix*, 3 E. & E. 701); and all the members of a firm of solicitors are liable for the negligent advice given by one of them to a client of the firm (*Blyth v. Fladgate*, (1891) 1 Ch. 337; *Morgan v. Blyth*, *ib.* 354; *Smith v. Blyth*, *ib.* 364); or for a fraud committed by one of them in the ordinary conduct of their business (*Brydges v. Bromfil*, 12 Sim. 369).

As a rule, the wilful tort of one partner is not imputable to the firm. For example, if one partner maliciously prosecutes a person for stealing partnership property, the firm is not answerable, unless all the members are, in fact, privy to the malicious prosecution (*Arbuckle v. Taylor*, 3 Dow. 160). But a wilful tort committed by a partner in the course and for the purpose of transacting the business of the firm may make the firm responsible (*Limpus v. L. G. O. Co.*, 1 H. & C. 526). A customer deposited a box containing various securities with his bankers for safe custody, and afterwards granted a loan of a portion of such securities to one of the other partners in the banking-house, for his own private purposes, upon his depositing in the box certain railway shares, to secure the replacing of the securities. This partner afterwards for his own purposes, and without the knowledge of the customer, subtracted the railway shares, and substituted others of a less value. It was held, that, as the proceeds of the railway shares were not applied to the use of the partnership, the banking firm were not answerable for this tortious act of their partner for his own benefit, nor for any loss occasioned by this subtraction of the shares, on the ground of negligence (*Ex parte Eyre*, 3 Mont. D & De G. 12).

**Action against partners.**—It is not every tort which, though committed by several persons acting together, is legally imputable to them all jointly; but supposing a tort to be imputable to a firm an action in respect of it may be brought against all or any of the partners. If some of them only are sued, they cannot insist upon the other partners being joined as defendants (*Sutton v. Clarke*, 6 Taunt. 29),

and this rule applies even where the tort in question is committed by an agent or servant of the firm, and not otherwise by the firm itself (*Mitchell v. Tarbutt*, 2 R. R. 684; *Ansell v. Waterhouse*, 6 M. & S. 385—*Lindley*).

**Action by partners.**—With respect to actions by partners founded on some tort, the general principle is that where a joint damage accrues to several persons from a tort, they ought all to join in an action founded upon it (*Addison v. Overend*, 6 T. R. 766; *Sedgworth v. Overend*, 7 T. R. 279); whilst on the other hand several persons ought not to join in an action *ex delicto* unless they can show a joint damage (*Story*).

**Discharge.**—As partners may all be affected by the tort of one partner, so also a discharge or release of one, on account of the tort, will amount to a discharge or release of all the other partners (*Cock v. Nash*, 9 Bing. 341; *Cheetham v. Ward*, 1 B. & P. 630—*Story*).

## VI. *Guardian and Ward.*

Guardians are not personally liable for torts committed by minors under their charge (*Luchman Dass v. Narayan*, 3 N. W. P. 191). But guardians can sue for personal injuries to minors under their charge on their behalf (*Modhoo Soodun v. Kaemoollah*, 9 W. R. 327).

## VII. *Husband and Wife.*

See Chapter III.

### (C). ABETMENT.

In actions of wrong, those who abet the tortious acts are equally liable with those who commit the wrong (*Kashee Nath v. Deb Kristo*, 16 W. R. 240; *Golab Chand v. Jiban*, 24 W. R. 437; *Wharton v. Muna Lal*, 1 Agra 96).

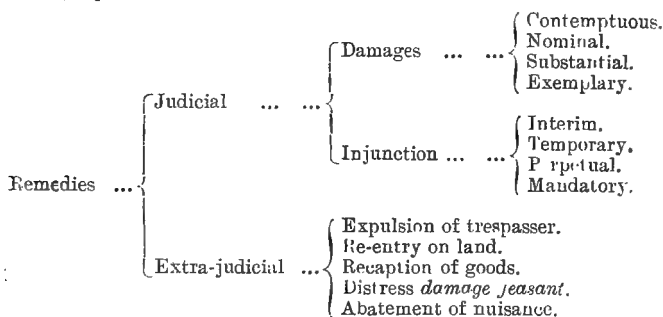
Where defendant maliciously incited persons to commit an act of indecency in the open shop of plaintiff, in consequence of which a crowd assembled, and damage was done to the plaintiff's business and reputation; it was held that the defendant was liable as he by his acts maliciously injured the plaintiff's trade and his character (*Plunkett v. Gilmore*, Fortes. 211).

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## CHAPTER IX.

### REMEDIES.

THERE are two kinds of remedies for torts, *viz.*, judicial and extra-judicial. *Judicial* remedies are remedies which are afforded by the act of law; while *extra-judicial* are those which are available to a party in certain cases of torts, by his own acts alone.



### JUDICIAL REMEDIES.

These remedies are of two kinds : (1) the awarding of damages, and (2) the granting of injunction. Damages and injunction are merely two different forms of remedy against the same wrong ; and the facts which must be proved in order to entitle a plaintiff to the first of these remedies are equally necessary in the case of the second. The onus resting upon a plaintiff who asks for an injunction, and does not say that he has as yet suffered any special damage, is if anything the heavier, because it is incumbent upon him to satisfy the Court that such damages will necessarily be occasioned to him in the future (per Lord Watson in *White v. Mellin*, (1895) A. C. 167).

### 1. *Damages.*

Damages are the pecuniary satisfaction which a plaintiff may obtain by success in an action. They are limited to the loss which a plaintiff has actually sustained. He is compensated for

(1). Any damage which is the natural or the probable consequence of an act such as that done by the defendant, whether the defendant contemplated such a consequence or not ;

(2). Any damage which the defendant did in fact contemplate at the time when he committed the tort as a natural or probable consequence of such tort.

(3). Any damage which is the probable result of the defendant's act, provided that whenever the probability of such a result ensuing depends upon the special circumstances of the particular case, the defendant will not be liable to compensate the plaintiff for such result, unless he had notice of such special circumstances at the time of his committing the tort.

By 'natural consequence' is meant such a result as must follow from the defendant's act in the ordinary course of nature, in short, a consequence which is physically necessary ; by 'probable consequence,' such a consequence as, human nature being what it is, usually follows from such an act as the defendant's, or so frequently follows that a person of ordinary intelligence and foresight would reasonably anticipate such a result.

Thus the defendant is only liable for such damages as he in fact contemplated or ought to have contemplated when he committed the tort. All other damage will be excluded as being too remote.

Where the defendant took up a pick-axe and chased the plaintiff's servant boy, who rushed for shelter into his master's shop and in so doing knocked out the faucet from a cask of wine whereby the wine ran out and was lost, the



defendant was clearly a wrong-door in pursuing the boy (*Vandenburgh v. Truax*, 4 Denio 464). The defendant determined to celebrate the happy deliverance of James I. in the orthodox fashion, and laid in a plentiful pyrotechnic supply with that intention. He threw a lighted squib into the market house at a time when it was crowded with those that bought and sold. The fiery missile came down on the shed of a vendor of ginger-bread, who to protect himself, caught it dexterously and threw it away from him. It then fell on the shed of another ginger-bread seller, who passed it on in precisely the same way; till at last it burst in the plaintiff's face and put his eye out. It was held that *he must be presumed to have contemplated all the consequences* of his wrongful act and was answerable for them (*Scott v. Shepherd*, 2 W. Bl. 892). Some beasts were being driven along an occupation road to the fields: they were crossing the level siding of the railway: some trucks were sent down the line negligently which frightened the cattle: the drovers recovered some of them, but the others went along the road, got into a garden through a defect in the fences, and so on to the line, where they were run over by a train and killed. Blackburn, J., in holding the company liable, said that so long as the want of control over the cattle remained without any fault of the owner, the *causa proxima* was that which caused the escape, for the consequences of which he who caused it was responsible (*Sneesby v. L. & Y. Ry.*, L. R. 9 Q. B. 263). Where the defendant company neglected to have gates and a watchman at a crossing as required by certain Acts, and one day a child was lying on the rails with one foot severed from his body; it was held that the accident to the child was by the company's omission (*Williams v. G. W. Ry.*, L. R. 9 Ex. 157). Where by negligent navigation of a vessel it became unmanageable against strong wind and tide and caused damage to the sea wall of the plaintiff, the owners of the vessel were held liable (*Bailiffs of Romney Marsh v. Trinity House*, L. R. 5 Ex. 204). Where the defendant's truck had, contrary to local regulations, been left out in the street for the night, the shafts being shored up and projecting into the road; a second truck was similarly placed on the opposite side of the road; the driver of a third truck endeavouring to drive past the narrowed way thus left, struck the shafts of the defendant's truck, which whirled round, struck and injured the plaintiff, who was on the side walk; it was held that the defendant was liable (*Powell v. Deveney*, 3 Cush. 300). Where defendant knowing plaintiff to be a farmer sold him a cow which he warranted free from disease and she was placed with other cows which became infected and died; the defendant was held liable for the entire loss as being a natural damage (*Smith v. Green*, 1 C. P. D. 92; *Mullet v. Mason*, L. R. 1 C. P. 559). The proprietor of a van and a ploughing apparatus left it by the grassy side of a road to remain there all night. While it was there a farmer came by driving a mare, a confirmed kicker, though not so to his knowledge. The brute shied at the van, ran away, and kicked the farmer to death. In an action it was held

that the van-proprietor was liable. "Though the immediate cause of the accident was the kicking of the mare, still the unauthorized and dangerous appearance of the van and plough on the side of the highway was within the meaning of the law the proximate cause of the accident." The plaintiffs sought to recover £125 which they had to pay to the workman on account of personal injuries caused by the defective condition of a chain which had been supplied to them with a warranty of fitness. The defendants contended that the damages were too remote because the plaintiffs would not have been liable if they themselves had not been guilty of negligence in omitting to examine the condition of the chain. Held, that the damages were recoverable. "It was true that in the action by the workman the plaintiffs would not be liable unless they had been negligent as between themselves and their workmen; but the plaintiffs refrained from examining the chain though relying on the defendant's warranty and the defendant could not rely on the plaintiff's breach of duty owed, not to the defendant, but to a different person" (per Lord Esher, M. R., in *Mowbray v. Merryweather*, (1895 2 Q. B. 640).

Where water, which had tickled down from a waste-pipe at a railway station on to the platform, had become frozen, and the plaintiff, a passenger, stepped upon it and fell and was injured; it was held that the defendants were liable since the non-removal of a dangerous nuisance, like ice, from their premises, was the proximate cause of the injury (*Shepherd v. Mid. Ry.* cited in *Sharp v. Powell*). The plaintiff had delivered to the defendant a mare to be agisted on his field, which was separated by a wire fencing from his neighbour's field in the occupation of a cricket club. Owing to the negligence of the defendant's servant the gate separating the two fields was left open and the mare strayed into the field occupied by the cricket club; whereupon some of the members of the club tried with all reasonable and proper care to drive the mare back through the gate into the defendant's field. But the mare refused to go through the gate and dashed against the wire fencing and injured itself. It was held that the injury to the mare was the natural consequence of the gate having been opened and that the defendant was liable (*Helestrap v. Gregory*, (1895) 1 Q. B. 561).

A passenger took a through ticket from Liverpool to Scarborough and had to change trains at York station, but through the unpunctuality of the defendants' train he missed the train at York. The passenger thereupon took a special train from York to Scarborough, although he had no business or pressing engagement at Scarborough necessitating his being there at any particular time, and brought an action against the defendants to recover the amount paid for it. The Court rejected the suit on the ground that if one party fails to perform his contract the other may do so as *reasonably* near as may be, and charge him for the *reasonable* expense incurred in so doing; and a proper test of what is reasonable in such a case is to consider whether, according to the ordinary

habits of society, a person delayed on his journey under circumstances for which the railway company were not responsible would have incurred the expenditure for a special train on his own account (*Le Blanch v. L. M. Ry.*, L. R. 1 C. P. 2:6). In a case, it appeared that there was a statutory direction that the banks of the docks were to be four feet above Trinity high-water mark and that the walls were to be maintained at that height. The walls were not of the required height, and during an extraordinary high tide, the plaintiff's land was submerged and considerably damaged. The defendants were held liable; but an important principle of damages was laid down. The extraordinary high tide, although an act of God, did not excuse them entirely from liability; nor, on the other hand, were they liable for the whole damage caused; the damage caused had to be severed, so much being attributable to the walls not being of the required height, and so much to the rising of the water above that height (*Nitro-Phosphate Co. v. London & St. Katherine Docks*, 9 Ch. D. 503). A lightship belonging to a harbour board and used for lighting approaches, was damaged in a collision caused by the negligence of the defendants. The place of the damaged ship was during her repair taken by another lightship belonging to the board and maintained at an annual expense for the purpose of such an emergency. Held, that the board was entitled to recover from the defendants not only the out-of-pocket expenses caused by the collision, but also substantial damages for the loss of the services of the damaged ship during the time her place was taken by the substituted lightship (*Owners of SS. Mediana v. Owners &c. of Comet*, (1900) A. C. 113).

*Indian case.*—A dispute having arisen regarding the possession of certain land, an order was passed, under s. 531 of the Criminal Procedure Code, 1872, forbidding both plaintiff and defendant to interfere with the land until either established his title in a civil Court. The land in consequence of this order was not cultivated in the following year. The plaintiff sued for damages for the loss of profits resulting from non-cultivation of the land. Held, that the damages were not the probable result of the defendant's act being the consequence of the order of the Magistrate (*Ammami v. Sellayi*, 6 Mad. 426).

**Remoteness of damage.**—Law will permit no damages to be recovered excepting such as are the natural consequences, and also the legal consequences of the tort.

1. Where the damage sustained by the plaintiff is neither the necessary nor the probable result of the defendant's act, nor such as can be shown to have been in his contemplation at the time, it will be excluded as too remote: *in jure non remota causa sed proxima spectatur* (in law the immediate or proximate, not the remote, cause of any event is regarded).

2. Damage will obviously be too remote when it is caused, wholly or principally, by the act of the plaintiff himself; it cannot then be regarded as the necessary result of the defendant's misconduct ( see *Boyce v. Bayliffe*, 1 Camp. 58; *Glover v. L. & S. W. Ry.*, L. R. 3 Q. B. 25). This is the rule in cases of contributory negligence.

3. Damage will be considered too remote when it is the wrongful act of a third party, such as could not naturally be contemplated as likely to spring from the defendant's conduct ( *Vicars v. Wilcocks*, 8 East 1 ). The defendant is not liable for any damage caused by facts or circumstances unconnected with himself. The defendant's act must be the pre-dominating cause of the alleged damage. If he by his conduct directly causes or compels a third person to do an act which produces damage to the plaintiff, such damage is not too remote, provided the defendant either did contemplate or ought to have contemplated such a result. But he is not responsible for any eccentric or foolish, nor *prima facie* for any negligent or illegal, conduct on the part of a third person.

The negligence of a railway company caused such an injury to a passenger that he became insane, and by reason of insanity he committed suicide; the injury was not regarded as the proximate cause of the death, and the company was held not liable for his death (*Scheffer v. W. & C. Ry.*, L. T. Aug. 1882). The plaintiff who was wrongly charged with not having a ticket and was removed with no more force than was necessary for the purpose from the train, left a pair of race glasses in the carriage, which were lost. The company was held not liable for its loss (*Glover v. L. S. W. Ry.*, L. R. 3 Q. B. 25).

The defendant's servant washed a van in the street in contravention of the Police Act. The water so used would, under ordinary circumstances, have escaped through a grating, but owing to a severe frost the grating had previously become blocked up with ice, and it, not being able to escape, formed a sheet of ice, on which plaintiff's horse slipped and was injured. Held, that the defendant was not liable as the injury was not the natural consequence of his act (*Sharp v. Powell*, L. R. 7 C. P. 253). But where the defendant wrongfully placed a barrier with spikes across a road, leaving an opening for the purposes of traffic, and a third party placed one of these spikes in the

roadway, and the plaintiff lawfully passing along the road at night, was injured by the spike, it was held that the defendant was liable as the injury was natural and probable consequence of his act (*Clark v. Chambers*, 3 Q. B. D. 327). This case is in conflict with the preceding case of *Sharp v. Powell*, but the law laid down in *Sharp v. Powell*, is supported by a current of authorities and is correct.

Damage to a pier had been occasioned by a vessel driven against it through the violence of the wind and waves, at a time when the master and crew had been compelled to escape from the vessel, and had consequently no control whatever over it. The House of Lords held that the owners were not liable. Lord O'Hagan said, in his judgment, "the ship should be dealt with as if it had been abandoned at the antipodes, and had been ploughing the ocean without a crew for years before it was driven against the pier" (*River Wear Comrs. v. Adamson*, 3 App. Cas. 743).

If a candidate for parliamentary honors makes a stump oration inveighing at his opponents generally, and waives his hat into the bargain, that is not the proximate cause of one of these opponents getting his windows or his head broken (*Peacock v. Young*, 18 W. R. 134).

*Indian cases.*—Where plaintiffs sued for possession of certain idols and prayed for damages on the ground that they had been prevented from receiving certain sums, which they might have received if they had the custody of the idols, it was held that no suit would lie as the damages were too remote (*Rameshar v. Ishan Chandra*, 10 W. R. 57). But the loss of rents to a landlord, resulting from his ryot's crops being injured and destroyed owing to a neighbouring landlord's stopping the outlets by which surface drainage water had from time immemorial flowed from the plaintiff's land, in consequence of which stoppage the plaintiff's land was flooded and the crops destroyed, it was held that this was not too remote a damage (*Anando Morji v. Humidunissa*, 1 B. L. R. 203). In an action against the owner for breach of the charter-party in not supplying a ship tight, staunch, and strong as stipulated, the plaintiffs sought to recover as damages arising out of such breach of the charter-party, the interest paid by them on the drafts in pursuance of their arrangement with the Comptoir d'Escompte, the sum they had to pay on renewing the bills, a further sum for interests on bills they could not negotiate in consequence of not being able to obtain bills of lading from the defendant, and the value of the stamps on the bills which had been cancelled in pursuance of the plaintiffs' arrangement with the Comptoir d'Escompte. Held, that such damages were too remote (*Robert v. Issac*, 6 B. L. R. 20).

A suit for wasilat, in respect of profits derived from a turn of worship, which are in their nature uncertain and voluntary, is not maintainable (*Kashi Chandra v. Kailash Chandra*, 26 Cal. 356; *Dino Nath v. Protap Chandra*, 27 Cal. 30; see also *Venkatasa v. Srinivassa*, 4 M. H. C. 410; *Ram Govind v.*

*Magistrate of Ghazee pore*, 4 N. W. P. 146 ; *Ramessur v. Ishan Chunder*, 10 W. R. 457).

*Leading cases.*—*Scott v. Shepherd* ; *Sharp v. Powell*.

### *Measure of damages.*

The expression ‘ measure of damages ’ means the scale or rule by reference to which the amount of damages to be recovered is, in any given case, to be assessed. Damages may arise to almost any amount, or they may dwindle down to being merely nominal. The amount of damages depends upon the nature of the action and the evidence.

There are four kinds of damages : (1) Contemptuous ; (2) Nominal ; (3) Substantial or Ordinary ; and (4) Exemplary or Vindictive or Retributory.

(1). **Contemptuous damages** are awarded when it is considered that an action should never have been brought.

(2). **Nominal damages** are awarded where an action was a proper one to bring, but the plaintiff has not suffered any special damage, and does not desire to put money into his pocket. Such damages are given where the purpose of the action is merely to establish a right, no substantial harm or loss having been suffered, for example, in cases of infringements of absolute rights of personal security (*e. g.*, assault) and property (*e. g.*, bare trespass, invasion of a right of easement, &c.). Nominal damages are so-called because they bear no relation even to the cost and trouble of suing, and the sum awarded is so small that it may be said to have “ no existence in point of quantity,” *e. g.*, one anna, one shilling.

It may, thus, be broadly stated that every infringement of a right involves a claim to nominal damages, though all actual damage is disproved (*Mayne*). However, it is not that in every such case only nominal damages are recoverable ; this will be so when not only

actual but contingent injury is negatived. But where there may be an injury, either existing at present, though unascertained, or to arise hereafter, and for which no fresh action could be brought, substantial damages may be given at once. As, for instance, in an action against a banker for not paying his customer's cheque (*Rolin v. Steward*, 14 C. B. 595), or on a covenant to pay off incumbrances (*Lethbridge v. Mytton*, 2 B. & Ad. 772), or a sum of money for which the plaintiff was jointly liable with the defendant to a third party (*Loosemore v. Radford*, 9 M. & W. 657). This rule applies equally whether the action is on a contract or for a tort.

(3). **Substantial, or ordinary, damages** are awarded where it is necessary to fairly compensate the plaintiff for the injury he has in fact sustained. Whatever sum is awarded, whether large or small, must afford a fair measure of compensation to the plaintiff with reference to the actual harm sustained by him. The law does not aim at *restitution* but *compensation*, and the true test is, what sum would afford, under the circumstances of each particular case, a fair and reasonable compensation to the party wronged for the injury done him, the plaintiff's own estimate being regarded as the maximum limit.

(4). **Exemplary, or vindictive, or retributory, damages** are awarded wherever the wrong or injury is of a grievous nature, done with a high-hand, or is accompanied with a deliberate intention to injure, or with words of contumely and abuse (*Thomas v. Harris*, 27 L. J. Ex. 353). It may happen that a wrong is done to a man which is not only an injury in the ordinary sense, but is in itself of so grave and reprehensible a character, or is done under such circumstances as to aggravate the injury and import insult or outrage, that it is next to impossible to measure damages by any strict numerical rule, *e. g.*, gross defamation ;

seduction of a man's daughter with deliberate fraud; a wanton trespass of land, persisted in with violent and intemperate behaviour; assault and false imprisonment under colour of a pretended right; malicious prosecution.

*General and special damages.*

**General damages** are such as the law will presume to be the natural or probable consequences of the defendant's acts. They need not be by proved evidence; for they arise by inference of law, eventhough no actual pecuniary loss has been, or can be, shown. Whenever the defendant violates any absolute legal right of the plaintiff, general damage to at least a nominal amount will be implied (*Ashby v. White*, 1 Sm. L. C. 231). In such cases the law presumes that some damage will flow in the ordinary course of things from the mere invasion of the plaintiff's right.

**Special damages**, on the other hand, are such as the law will not infer from the nature of the act complained of; they must therefore be specially claimed on the pleadings, and strictly proved at the trial. Such damages depend upon the special circumstances of the case, upon the defendant's position, upon the conduct of the third persons, &c. In some actions of tort, where no actual and positive right of the plaintiff has been infringed, special damage is essential to the cause of action; and if it be not proved, the plaintiff will be non-suited. The law is very strict as to special damage, where it is necessary to support the action. In such a case the plaintiff must prove the loss of money, or of some other material temporal advantage, *e. g.*, loss of a marriage, of employment, of income, of custom, of profits, and even of gratuitous entertainment and hospitality; but not pain of mind, and



annoyance or vexation. Where, however, special damage is not essential to the cause of action, the plaintiff is entitled to recover general damages without proof of actual pecuniary loss. Still, in this case, if any special damage has in fact been suffered, the plaintiff can claim to be compensated for this in addition to his general damages, provided he has set out such claim in his pleading, so that the defendant may not be surprised at the trial. Should the plaintiff in such a case fail to prove his special damage at the trial, he may still resort to and recover general damages. A plaintiff who succeeds in recovering general damages may yet be ordered to pay the costs occasioned by a claim for special damage which he has failed to substantiate (*Forster v. Farquhar*, (1893) 1 Q. B. 564).

Where special damage is the gist of a plaintiff's case, and he fails to prove such damage, he is precluded from recovering ordinary damages (*Wilson v. Kanhya*, 11 W. R., 143).

*Prospective and continuing damages.*

Damages when given are taken to embrace all the injurious consequences of the wrongful act, unknown as well as known, which may arise hereafter, as well as those which have arisen, so that the right of action is satisfied by one recovery. "When the cause of action is complete, when the whole thing has but one neck, and that neck has been cut off by the act of the defendant, it would be most mischievous to say—it would be increasing litigation to say—you shall not have all you are entitled to in your first action, but you shall be driven to bring a second, a third, or a fourth action for the recovery of your damages" (per Best, J., in *Richardson v. Mellish*, 2 Bing. 240).

It is necessary to distinguish between a complete cause of action which may yet produce fresh damage in the future, and a continuous cause of action from which

continuous damage steadily flows. The plaintiff may be injured in a railway accident, and recover substantial damages from the company, and subsequently disease of the brain or of the spine may develop, which is solely due to the accident. He cannot bring a second action, or claim further damages in the first action. But where the cause of action is a continuing one (as an action for a continuing trespass) a fresh cause of action arises every day that such breach or injury continues (*Hole v. Chard Union*, (1894) 1 Ch. 293). Should the injury complained of be repeated after the assessment of damages it is open to the plaintiff to bring a fresh action. Where the cause of action is not a continuing one the damages should be assessed once for all. No fresh action can be brought for any subsequent damage that may hereafter arise from that act. Not only the damage that has accrued, but also such damage, if any, as it is *reasonably certain will occur in the future*, should be taken into consideration. The plaintiff should be compensated for every *prospective* loss which would naturally result from the defendant's conduct, but not for merely problematical damages that may possibly happen, but probably will not (*Hodsoll v. Stallebrass*, 11 Ad. & E. 301; *Phillips v. L. & S. W. Ry.*, 5 Q. B. D. 78; *Lambkin v. S. E. Ry.*, 5 App. Cas. 352; *Koomaree v. Bama Soonderee*, 10 W. R. 202).

In an inquiry as to damages in respect of a continuing cause of action, the damages are to be assessed down to the date when the assessment takes place (*Hole v. Chard Union*, (1894) 1 Ch. 293).

Where special damage is essential to the cause of action, such special damage as is alleged and proved will only be awarded. Hence, it would seem to follow that if any fresh damage followed in the future, that would constitute a fresh ground of action, because it was not included in the first (North, C. J., in *Townsend v. Hughes*, 2 Mod.

159). Thus, a second action will lie for fresh special damage in all cases in which no action lies at all without proof of special damage (*Crumbie v. Wallsend Local Board*, (1891) 1 Q. B. 503).

Two actions can also be brought where the same facts give rise to two distinct causes of action (*Brunsdon v. Humphrey*, 14 Q. B. D. 141).

Where the plaintiff, whilst driving in his cab, was injured by defendant's negligence, and having recovered damages in an action for the injury to the cab, he brought a second action for personal injuries, it was held that he was entitled to do so, these being two distinct causes of action (*Brunsdon v. Humphrey*, 14 Q. B. D. 141).

Where the plaintiff had received a blow on the head, and sustained little apparent injury, and recovered small damages, and afterwards, in consequence of the blow, a portion of his skull came away, and it then appeared that the skull had been fractured, and he then brought a second action, which was attempted to be supported on the ground that the former action was for a mere battery and this for mayhem, it was held that no action lay, for there was but one blow, and that was the cause of action in both suits, and not the consequences (*Feller v. Beal*, 1 Ld. Raym. 339). While attempting to enter a car of the defendants, the plaintiff's wife was injured through the negligence of the guard in closing the gate upon her. She had been pregnant for a few weeks and as a result of the injury, miscarried. Held, that plaintiff could not recover damages for the loss of prospective offspring (*Butler v. Manhattan &c. Ry.*, 38 N. E. R. 454, N. Y.).

*Indian cases.*—Where the plaintiff was a cultivator and his land was flooded owing to the cutting of a bank of a reservoir on his land, he was held entitled, as damages, to the profits which he would have realized, if he had cultivated the land (*Panand Sing v. Meher Ali*, 8 W. R. 365). Where the defendant kept the plaintiff out of possession of certain land, and also cut down all the fruit-bearing and timber trees, and carried away or destroyed by brick-making all the fertile soil, it was held, that the plaintiff was entitled to damages for prospective loss in addition to that which had actually occurred (*Kumaree v. Dassee Bama Sundari*, 10 W. R. 202).

### *Damages for mental and nervous shock.*

By *mental shock* is meant a shock to the moral or intellectual sense : by *nervous shock* a shock to the nerve and brain structures of the body.

No action will lie for **mental suffering** unattended by physical injury. "Mental pain or anxiety the law cannot value, and does not pretend to redress, when the unlawful act complained of causes that alone; though where a material damage occurs, and is connected with it, it is impossible a jury, in estimating it, should altogether overlook the feelings of the party interested" (per Lord Westbury in *Lynch v. Knight*, 9 H. L. 598). For example, in a case of defamation the Court in assessing damages could not avoid taking into consideration the injured feelings of the plaintiff, though if the plaintiff failed to prove publication to a third party, no matter how deeply his feelings might be wounded at the words used to him by the defendant, he would have no remedy by way of damages. However keen and painful an emotion of the mind may be, it can only be measured and proved by physical effects. The case of assault forms an exception to this, for the essence of the wrong consists in putting a man in present fear of violence.

As regards damage arising from **nervous shock**, the Privy Council has ruled that such damage is not the natural result of negligence, and is, therefore, too remote to fix defendant with liability (*Victoria Ry. Commis. v. Coultas*, 13 App. Cas. 222). But this case is severely criticised as laying down bad law. In their Lordships' judgment the difference between a 'nervous shock' and a 'mental shock' is overlooked. This decision has been pronounced to be open to question (*Pugh v. L. B. & S. Ry.*, (1896) 2 Q. B. 248) and the Irish Court of Appeal has even dissented from it (*Bell v. G. N. Ry.*, 26 L. R. Ir. 428). In a recent case Wright, J., refused to follow the *Coultas' case* (*Williamson v. Downton*, (1897) 2 Q. B. 57), and very recently it is laid down that damages which result from a nervous shock occasioned by fright unaccompanied by any actual impact may be recoverable in an action for negligence if physical injury has

been caused to the plaintiff (*Dulieu v. White and Sons*, (1901) 2 K. B. 669; *Victoria Ry. Com. v. Coultas*, *sup.*, not followed). The true question in determining liability in cases of this kind would seem to be that formulated by Pollock, *viz.*, "whether the fear in which the plaintiff was put by the defendant's wrongful or negligent conduct was such as, in the circumstances, would naturally be suffered by a person of ordinary courage and temper, and such as might thereupon naturally and probably lead, in the plaintiff's case, to the physical effects complained of."

A husband and wife were driving in a buggy across a railway crossing, when owing to the negligence of the gate-keeper, the buggy was nearly but not quite run down by a passing train. The wife fainted and received a severe nervous shock from the fright, and in consequence afterwards suffered a severe illness. It was held, however, that the damage was too remote to be recovered (*Victoria Railway Commissioners v. Coultas*, 13 App. Cas. 222). The plaintiff was an invalid, and being at the time ill in bed, she was startled by a noise, which proved to be the crash of a broken window pane, some of the glass of which fell on her bed. The cause of the crash was the pole of a van driven by one of the defendant's servants, the horses of which had run away. The consequences to the plaintiff, according to the evidence, were serious. She sustained a severe mental shock, which made her frequently hysterical, and incapacitated her from attending to her daily duties in the house. But the jury after a long deliberation could not agree in their verdict and were discharged (*Ames v. G. E. Ry.*, T. L. R. June 1880). In *Smith v. Johnson & Co.*, decided in January 1897, it was held that where a man was killed in the sight of the plaintiff by the defendant's negligence, and the plaintiff became ill, not from the shock of fear of harm to himself, but from the shock of seeing another person killed, this harm was too remote a consequence of the negligence.

The defendant knowingly and falsely represented to the plaintiff that her husband had met with a serious accident and was lying in great danger. By reason of this mis-representation the plaintiff suffered great mental anguish, and was made seriously ill, and her hair was turned white, and her life was for some time in great danger; and her husband had to incur expenses for medical treatment for her. These consequences were not in any way the result of previous ill-health or weakness of constitution; nor was there any evidence of predisposition to nervous shock or of any other idiosyncrasy. It was held that an action for damages would lie (*Wilkinson v. Downton*, *sup.*). The plaintiff, who was in a family way, was behind the bar of her husband's public-house, and the

defendants by their servants negligently drove a pair-horse van into the public house. The plaintiff in consequence sustained a severe shock and became seriously ill and gave premature birth to a child, who in consequence of the shock sustained by the plaintiff was born an idiot. Held, that the defendant was liable, and the damages sought to be recovered were not too remote (*Dulieu v. White & Sons, sup.*).

*Indian case.*—Damages are not usually awardable under the express head of mental anxiety, but Courts are at liberty to give damages which may effectually protect the injured party from the repetition of the wrong (*Furookh v. Fuzul*, 1 N. W. P. 209). In estimating damages for malicious prosecution, a Court is not necessarily wrong in taking into consideration the plaintiff's feelings (*Huro Lall v. Huro Chunder*, 12 W. R. 89; *Rai Jung Bahadur v. Rai Gudur*, 1 C. W. N. 537).

### *Insurance.*

The recovery by plaintiff of full compensation for the loss or damage his property has sustained, under a contract with insurers, cannot be given in evidence in reduction of damages in an action against the wrong-doer who has done the mischief. The plaintiff's contract with the under-writers or insurers is *res inter alios acta*, of which the defendant cannot avail himself. If it were not so, the wrong-doer would take the benefit of a policy of insurance without paying the premium (*Yates v. Whyte*, 4 Bing. N. C. 289). A plaintiff, however, who has received a full indemnity for his loss under a contract of insurance, and has afterwards recovered compensation in an action for damages against the wrong-doer, is not entitled to a double satisfaction; but, as soon as he has received from the under-writer or insurer the amount which he has insured, he becomes a trustee for the latter in respect of any compensation paid or payable by the wrong-doer, and is bound to hand over to the insurer whatever money he receives from the wrong-doer over and above the actual loss he has sustained, after taking into account the amount he has received under the contract of insurance. The insurer, moreover, who has paid the loss, is entitled to sue in the name of the insured

for the purpose of recovering from the wrong-doer full compensation for the injury (*Randall v. Cock*, 1 Ves. Sen. 97). But the right of the insurer is merely to make such claim for damages as the insured could have made; and when the latter cannot assert a claim for damages against the wrong-doer, neither can the insurer do so (*Simpson v. Thompson*, 3 App. Cas. 279.—*Addison*).

In an action for an injury done to the plaintiff's vessel from negligence in running it down at sea, the fact of the plaintiff having received from the underwriters the amount of the loss was held to be no answer to the plaintiff's claim for damages (*Yates v. Whyte*, 4 Bing. N. C. 272). In an action for injuries caused by the defendant's negligence, a sum received by the plaintiff on an accidental policy cannot be taken into account in reduction of damages (*Bradburn v. G. W. Ry.*, L. R. 10 Ex. 1).

### *Aggravation and mitigation of damages.*

As damages may be aggravated by the defendant's ill-behaviour or motives, so they may be reduced by proof of provocation, or of his having acted in good faith; and many kinds of circumstances which will not amount to justification or excuse are for this purpose admissible and material (*Perkins v. Vaughan*, 4 M. & G. 789). In all cases where motive may be a ground of aggravation, evidence on this score will also be admissible in reduction of damages (*Mayne*).

### *Damages in actions of Contract and Tort.*

The measure of damages, or test by which the amount of damages is to be ascertained, is, in general, the same both in contract and in tort, with these distinctions:—

(1). The *intention* with which a contract is broken is perfectly immaterial; while the *intention* with which a tort is committed may fairly be regarded by the Court in assessing the amount of damages; in other words, the Court is not particularly careful to weigh “in golden scales” the

damages recoverable in tort. Thus, in actions of contract evidence of malicious motive is not admissible, in those of tort it is (*Sears v. Lyons*, 2 Stark. 317).

(2). In cases of contract, damages are only a *compensation*; of tort to the property, they are generally the same. Injuries to property are only visited with damages proportioned to the actual pecuniary loss sustained, where damage, pecuniary or estimable in money, is the gist of action. But where absolute rights are infringed, a plaintiff is awarded nominal damages not because he has lost anything but because his rights are absolute. Where the injury is to the person, or character, or feelings, and the facts disclose fraud, malice, violence, cruelty, or insult, it is difficult to fix a limit and damages awarded in such cases are exemplary. They bear no proportion to the actual loss sustained by the plaintiff. Here the principle is not compensation to the plaintiff, or recognition of the superiority of his rights, but the turpitude of the defendant, the expression or manifestation of disapprobation of defendant's conduct and of a desire to prevent its repetition. Exemplary damages operate as a punishment for the benefit of the community and as restraint to the transgressor. But vindictive damages cannot be recovered in an action on a breach of contract, except action for breach of promise of marriage.

(3). The condition of the defendant and his being a man of substance, are also proper circumstances of aggravation in cases of tort but not of breaches of contracts.

The rule with regard to the *remoteness of damage* is precisely the same whether the damages are claimed in actions of contract or of tort (*The Notting Hill*, 9 P. D. 113).

## 2. *Injunction.*

An injunction is an order of a Court restraining the commission, repetition, or continuance of a wrongful act of the defendant (*Joyce*). The object of the interference by in-



junction is to prevent the infringement or disturbance of a right (*Herr v. Union Bank*, 2 Giff. 686), or for the purpose of better enforcing rights, or preventing mischief until such rights have been ascertained (*Saunders v. Smith*, 3 M. & C. 729).

**When granted.**—An injunction may be granted to prevent waste ; or trespass ; or the continuance of nuisances to dwelling houses, and houses of business, to right of support, to water, to rights of way, to highways, to ferries, to market, &c., or the infringement of patent rights, copyright and trademarks ; or the publication of trade secrets ; or the wrongful sale or detention of a chattel ; or the publication of a libel or the oral uttering of a slander ; or the disclosure of confidential communications, papers, secrets, &c. ; or the publication of manuscripts, letters, and other unpublished matter.

Before granting an injunction the Court must be satisfied, *firstly*, that the injury which is apprehended will be either continuous or frequently repeated, or very serious (*Att. Gen. v. Cambridge Consumers Co.*, L. R. 4 Ch. 31).

*Secondly.* The Court must consider what relation the damage which would be caused to the plaintiff by refusing the injunction and to the defendant by granting it bear to one another.

To this rule, however, there is an *exception*, where the expenditure, which the granting of injunction would cause to be thrown away, has been wilfully incurred by the defendant after notice of the plaintiff's right, and in defiance of it.

*Thirdly.* The interests of third persons must in such cases be considered (*Wood v. Sutcliffe*, 2 Sim. N. S. 165), as, for instance, where the granting of an injunction would cause the stoppage of a trade and the throwing out of work of a large number of people.

*Fourthly.* The Court must consider whether the plaintiff by his acquiescence in the defendant's conduct has caused him to alter his position. If the plaintiff sees the defendant laying out money in buildings or manufacturing works which when completed will be productive of injury to him, he ought to complain without delay (*Duke of Leeds v. Earl of Amherst*, 2 Ph. 117). The Court "will not permit a man, knowingly though but passively, to encourage another to lay out money under an erroneous opinion of title; and the circumstance of looking on is, in many cases, as strong as using terms of encouragement" (per Lord Eldon, in *Dann v. Spurrier*, 7 Ves. 235. See also *Ramsden v. Dysen*, L. R., 1 H. L. 129; *Beni Madhab v. Jaykrishna*, 7 B. L. R. 252; *Onkarappa v. Subbhajee*, 15 Bom. 101; *Dattatraya v. Shridhar*, 17 Bom. 736; *Yashodabai v. Ramchandra*, 18 Bom. 66; *Nannilal v. Rameshur*, 16 All. 328).

An *interim injunction* is only granted when delay would prevent or render extremely difficult the subsequent administration of justice.

See ss. 53, 54, 55 and 56 of the Specific Relief Act (I of 1877) as regards the granting or withholding of injunction.

#### EXTRA-JUDICIAL.

The remedies falling in this class will be found treated in their proper places. Of these the remedy of *abatement* is now in use only as to rights of common, rights of way, and sometimes rights of water, and even in those cases it ought never to be used without good advisement.

#### JOINT TORT-FEASORS.

Persons are said to be joint tort-feasors when (1) their respective shares in the commission of the tort are done in furtherance of a common design, or, (2) where, being

strangers to one another, their independent wrongful acts contribute to produce but one joint result (*C. & L.*, 53).

The liability of the wrong-doer in tort is joint and several. To constitute a joint liability the act complained of must be joint, not separate; for, if separate, separate actions, and not a joint one, must be brought. Claims for damages against two or more defendants for wrongful acts committed by them independently of each other cannot be joined in one suit although the wrongful acts complained of are all identical in their nature (*Sadler v. G. W. Ry.*, (1896) A. C. 450). Where the plaintiff has sued several defendants jointly, and it appears that separate actions should have been maintained against each defendant, the plaintiff may be put to his choice as to which one defendant he will proceed against in the suit before the Court (*Nilmadhub v. Dukhee Ram*, 15 B. L. R. 161).

In connection with the liability for a joint act the following principles should be observed—

1. Joint tort-feasors may be sued jointly or severally. If sued jointly, the damages may be levied from all or either (*Hume v. Oldacre*, 1 St. 352; *Blair v. Deakin*, 57 L. T. 522). Each is responsible for the injury sustained by their common act.

2. A judgment against one or more of several tort-feasors is a bar to any further action against the others, even though the judgment remains unsatisfied (*Brinsmead v. Harrison*, L. R. 7 C. P. 547). Otherwise a vexatious multiplicity of actions would be encouraged.

3. A release granted to one or more of the several tort-feasors operates as a discharge of the others. But a mere covenant not to sue one of them is no bar to an action against others (*Duck v. Mayen*, (1892) 2 Q. B. 511; *Price v. Reed*, (1900) 1 Q. B. 67).

Joint-liability of a tort may also arise out of agency,

as in the case of master and servant, principal and agent, or partners, or from ratification.

If several co-proprietors of a stage-coach intrust the driving of the coach to one of them, all will be responsible for injuries caused by his negligent driving (*Moreton v. Harden*, 4 B. & C. 223); and, if two omnibuses are racing, and one of them runs over a man who is crossing the road and has not time to get out of the way, the injured person has a remedy against the proprietor of either omnibus (per Creswell, J., in *Thoroughgood v. Bryan*, 8 C. B. 121). Where two persons have a joint purpose and thereby make themselves joint-trespassers, and the one beats violently, and the other a little, the real injury is the aggregate of the injury received from both, and each is responsible for all the damage (*Clark v. Newsam*, 1 Ex. D. 140; *Brown v. Allen*, 4 Esp. 158).

The plaintiff occupied premises, No. 268, Strand, London, and there sold things required by cyclists. One of the defendants, a Railway Company, occupied premises No. 269, just to the north of the plaintiff's premises, and the other defendant, also a Railway Company, occupied No. 267 just to the south of the plaintiff's premises. In carrying on their business each of the defendants caused many carts and vans to stand in the public highway for long periods and thus obstructed the access to his premises and caused inconvenience and damage to the plaintiff. The plaintiff claimed (1) £5,000 damages jointly and severally from each of the defendants; (2) an injunction to restrain them or each of them from doing the acts complained of. Held, that the action could not be maintained in this form and that one of the defendants must be struck out (*Sadler v. G. W. Ry.*, *sup.*).

*Indian cases.*—In a suit for compensation for damage done to property, each and every one of the persons was equally responsible to make compensation for the loss sustained, when he happened to be a part of the common assembly and executed a common purpose, and not in proportion to his share of the plunder received or of the damage done by him. Coercion to form a member of the assembly or bear a part in the damage is no excuse from responsibility in a civil suit for compensation (*Ganesh Sing v. Ram Raja*, 3 B. L. R. 44 P. C.). In a suit to recover possession of land from the enjoyment of which as a tenant-in-common the plaintiff had been excluded by the joint action of all the defendants, who had divided the property between themselves, it was held that the defendants were all equally responsible for the damage sustained by the plaintiff, and that none of them could restrict their liability for mesne profits to that portion only of which they are in possession (*Jahunki v. Ajudhya*, 19 W. R. 218; *Shama Shunker v. Shree Nath*, 12 W. R. 351).

#### CONTRIBUTION BETWEEN WRONG-DOERS.

No action for contribution is maintainable by one wrong-doer against another, although the one who seeks contribution may have been compelled to satisfy the whole

damages (*Merryweather v. Nixan*, 8 T. R. 186; *Harnath v. Haree Singh*, 4 N. W. P. 116); provided that the wrong is so obviously unlawful that no reasonable man in committing it could suppose that he was doing a lawful act (*Adamson v. Jarvis*, 4 Bing. 66; *Ramskill v. Edwards*, 20 Ch. D. 100; *Palmer v. Wick & P. S. S. Co.*, (1894) A. C. 318; *Burrows v. Rhodes*, (1899) 1 Q. B. 816; *Suput Singh v. Imrit Tewari*, 5 Cal. 720; *Kishna Ram v. Rakmini*, 9 All. 221; *Fakire v. Tasadduk*, 17 A. W. N. 107; *Hari Saran v. Jotindra*, 5 C. W. N. 393). No contribution is allowed between joint tort-feasors because the community of wrong between them is the foundation of the action, but the same community of wrong precludes the defendant from recovering what he has paid in consequence of the illegal act (*Lakshmana v. Ranga Sami*, 17 Mad. 80).

This rule does not extend—

(1). To cases of indemnity, where one man employs another to do acts, not unlawful in themselves, for the purpose of asserting a right. Therefore, where an act has been done by the plaintiff under the express instructions of the defendant which occasions an injury to the right of third persons, yet if such act is not apparently illegal in itself, but is done honestly, and *bona fide*, in compliance with the defendant's directions, the latter shall be bound to indemnify the former against the consequences thereof (*Betts v. Gibbins*, 2 A. & E. 57; *Collins v. Evans*, L. R. 5 Q. B. 830).

(2). Where one party induces another to do an act which is not legally supportable, and yet is not clearly in itself a breach of law, the party so inducing shall be answerable to the other for the consequences (*Broom*).

(3). Where defendants have acted under a *bona fide* claim of right, and has reason to suppose that they had a right to do what they did, then they may have a right of

contribution *inter se*. In such a case the Court should inquire what share they each took in the transaction ; because, according to circumstances, one or more of them might be excused altogether, or in part, from contributing, as for instance, one of them might have acted as a servant, and by command of the others, or the others might have been the only persons benefited by the wrongful act ; in which case those who were benefited, or who ordered the servant to do the act, would not be entitled to contribution, but those not benefited or the servant might be (per Garth, C.J., in *Suput Singh v. Imrit Tewari, sup.*; *Krishnaram v. Rukhmini, sup.*; *Betts v. Gibbins*, 2 A. & E., 57; *Hari v. Jotindra*, 5 C. W. N. 393).

The plaintiff and defendant destroyed the machinery and injured the mill of a Yorkshireman named Starkey. The mill-owner was not prepared to submit tamely, and brought an action against the pair of them. The jury gave him £840 as damages, and instead of getting £420 from each, he made the plaintiff pay £840. The plaintiff sued the defendant for contribution, that is to say, £420. It was held that the defendant was not liable to contribute; for, *ex turpi causa non oritur actio* (*Merryweather v. Nixan*, 8 T. R. 186). But it has been held that in Scotland the law is different. Where a person had been injured by the negligence of A and B, and had recovered damages against them jointly with costs, and extracted both decrees and a charge to A, who paid the whole sum and took an assignation to the decrees. Held, that A had a claim of relief against B for the moiety of the sum paid by A, and that B could not successfully defend on the ground of A and B being joint delinquents, as the foundation of A's claim rested on a civil debt. Lord Herschell said: "It is now too late to question that decision in this country; but when I am asked to hold it to be part of the law of Scotland, I am bound to say that it does not appear to me to be founded on any principle of justice or equity, or even of public policy, which justifies its extension to the jurisprudence of other countries. There has certainly been a tendency to limit its application even in England" (*Palmer v. Wick & Pulteneytown S. S. Co.*, (1894) A. C. 318, 324).

It will be pointed out hereafter, in discussing the doctrine of contributory negligence, that in cases of collision the loss is equally divided between both ships. Two vessels came into collision and both were held in the admiralty division to blame, the damages arising therefrom to be borne equally. In consequence of the collision one of the vessels collided with and sank a barge at anchor, and was compelled to pay damages. Held, that the damages so paid

must be borne equally by the two vessels (*The Frankland*, 17 T. L. R. 419).

*Indian cases.*—S granted to G and A a *putni* of a certain share in a Zemindari, and thereupon P brought a suit against G, S and A, for specific performance of an agreement to grant to him (P) a *putni* of the same share. That suit was decreed with costs, the whole of which were realized from G. In a suit for contribution brought by G against S and A, the lower appellate Court found that G, S and A had conspired in setting up a false defence in the former suit in order to defeat P's claim. Held, in second appeal, that assuming such collusion were proved, the suit for contribution was not maintainable, G, S and A being joint wrong-doers (*Gobind Chunder v. Srigobind*, 24 Cal. 330).

Where the plaintiffs were in possession of lands standing in the names of their father and deceased brother, part of which was sold by the deceased brother's widow to the defendants who got a decree for possession against the plaintiffs who kept the former out of possession. Held, that the plaintiff's possession should not be considered as that of tort-feasors and they were therefore entitled to recover from the defendants by way of contribution the rent paid by the plaintiffs for the portion of the land purchased by the defendants (*Mohesh Chawtra v. Boydya Nath*, 6 C. W. N. 88). The equitable rule of contribution, will not apply to defendants in a suit for damages for libel (*Golan Hoosein v. Inam Bux*, P. R., 32 of 1866: *Sudhu Singh v. Lehn Singh*, P. R., 7 of 1901). Where a joint decree was passed against two joint tort-feasors and one of them paid the whole amount of the decree, and afterwards sued the other for contribution. Held, that whatever rights and liabilities of joint tort-feasors *inter se* may be before such a decree is passed, there is a right of contribution afterwards, the matter having passed *in rem judicatum*; and the Court is not entitled to go behind such a decree and consider the merits of the case (*Ram Pershad v. Arja Nand*, 10 A. W. N. 161).

A deed of partition between A and B, members of an undivided Hindu family, provided that A, who took over all the debts due to the family, should bear the loss, if any, incurred in the appeal then pending in a suit brought by the family on a bond. The bond was held to evidence a fraudulent transaction, and the appeal was dismissed with costs. The decree for costs was executed against B and satisfied by him. He sued the son of A (deceased) to recover the amount paid by him. Held, that the plaintiff was entitled to recover, the claim not being barred by the rule against contribution between joint tort-feasors (*Lakshmana v. Rangasami*, 17 Mad. 78).

*Leading case.*—**Merryweather v. Nixan.**

## CHAPTER X.

### CLASSIFICATION OF TORTS.

TORTS are infinitely various not limited or confined, for there is nothing in nature but may be an instrument of mischief (per Pratt, C. J., in *Chapman v. Pickersgill*, 2 Wils. 145). All writers on the law of torts unanimously agree that it is difficult to classify torts with scientific accuracy. Some writers subdivide one portion of the whole class of wrongful acts upon one principle, and another portion on another principle. In order to give the reader an exact idea of this intricate and much discussed subject, the classifications attempted by various writers have been given herein; but that of Pollock is perhaps the best classification that can be suggested.

Pollock has arranged the familiar and typical species of torts under three well-marked and easily intelligible divisions.

#### GROUP A.

##### *Personal Wrongs.*

1. Wrongs affecting safety and freedom of the person :—  
Assault ; battery ; false imprisonment.
2. Wrongs affecting personal relations in the family :—  
Seduction ; enticing away of servants.
3. Wrongs affecting reputation :—  
Slander and libel.
4. Wrongs affecting estate generally :—  
Deceit ; slander of title ; fraudulent competition by colourable imitation, &c., malicious prosecution ; conspiracy.

#### GROUP B.

##### *Wrongs to Property.*

1. Trespass : (a) to land,  
(b) to goods.



Conversion and unnamed wrongs *ejusdem generis*.

Disturbance of easements, &c.

2. Interference with rights analogous to property, such as private franchises, patents, copyrights, trademarks.

#### GROUP C.

*Wrongs to Person, Estate, and Property generally.*

1. Nuisance.
2. Negligence.
3. Breach of absolute duties specially attached to the occupation of fixed property, to the ownership and custody of dangerous things, and to the exercise of certain public callings.

Underhill divides tort into the following classes, *viz* :—

1. Malicious acts, or acts so reckless as to imply malice.

This class covers cases of defamation, malicious prosecution and arrest, maintenance, seduction, fraud, and conspiracy.

2. Negligent acts or omissions.

This class comprises all cases arising out of the breach of the duty of care.

3. Acts or omissions in relation to the user of property or otherwise not depending on malice or negligence.

This class includes all cases coming under the maxim *sic utere tuo ut alienum non lædas*, e. g., nuisances.

4. Acts without legal justification directly infringing another's private rights.

This class embraces all those unauthorized violations of the rights of person and property conferred by law on every member of the community, including assault and battery, false imprisonment, trespass on and dispossession of lands, trespass to and conversion of personal property, infringement of patents and trademarks, and the like.

Collett classifies torts in respect to their *nature*, and also in respect to their *objects*. The first mode of division is essential for their apprehension and analysis. The latter is more convenient for the purpose of enumerating the various instances of torts.

In respect of their *nature*, torts may be divided into—

- (1). The invasion of some general legal right, or *jus in rem* of the plaintiff;
- (2). The invasion of some duty towards the public productive of special damage to the plaintiff; and
- (3). The violation of some private duty or obligation productive likewise of damage to the plaintiff.

In cases falling under (1), a plaintiff *may* be called upon to show two things, *viz.*, (a) the existence of the right alleged, and (b) its violation. It is not necessary to show any damage, this being a case of *injuria sine damno*. In cases falling under (2), the plaintiff *must* prove (a) the existence of the public duty; (b) its breach; and (c) the special damage resulting to himself therefrom. Under (3), the plaintiff *must* show (a) the existence of the duty; (b) its breach; and (c) the consequential damage. In (2) and (3) there is no injury unless there is special damage, these two being cases of *damnum injuria*.

In respect to their *objects*, torts may be classified according as they concern—

1. The person and personal rights; these include those arising from:—

(1) Invasion of a General Right.

Assault and battery. False imprisonment. Malicious conviction. Malicious arrest. Malicious prosecution. Libel and slander. Slander of title. Invasion of personal rights, such as franchise, office, &c.

(2) Breach of public duty.

Injuries to person from Negligence.

(3) Breach of private duty.

Negligence of professional men. Negligence of carriers of passengers.

2. Property whether real or personal:—

(A) Torts to real property. Those which arise from—

(1) Invasion of a General Right.

Adverse occupancy. Trespass. Trespass *ab initio*.

(2) Breach of duty, either public or private.

Nuisances. Rights to water. Right of support. Rights of common. Waste.

(B) Torts to personal property. These include those which arise from—

(1) Invasion of a General Right.

Trademarks. Copyright. Patent rights. The right to manuscripts, letters, &c. Trespass and Conversion of goods. Detention of goods.

(2) Breach of private duty.

Wrongful distress.

(3) Breach of public duty.

Bailments. Innkeepers. Common carriers. Deceit.

Broom has also classified torts according to Collett's division of torts in respect to their *nature*.

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# TORTS TO PERSON.

## CHAPTER XI.

### ASSAULT AND BATTERY.

AN assault is the unlawful laying of hands on another person, or an attempt or offer to do a corporal hurt to another, coupled with an apparent present ability and intention to do the act (*Stephen*). "Any gestures calculated to excite in the party threatened a reasonable apprehension that the party threatening intends immediately to offer violence, or, in the language of the Indian Penal Code, is 'about to use criminal force' to the person threatened, constitute, if coupled with a present ability to carry such intention into execution, an assault in law" (per Arnould, C. J., in *Cama v. Morgan*, 1 B. H. C. 205). Striking at a person with or without a weapon; holding up a fist in a threatening attitude sufficiently near to be able to strike; presenting a gun or pistol, whether loaded or unloaded, in a hostile and threatening manner, within gun-shot or pistol-shot range, and near enough to create terror and alarm; riding after a man with a whip threatening to beat him; shaking a whip in a man's face; advancing with hand uplifted in a threatening manner with intent to strike, although the person is stopped before he gets near enough to carry the intention into effect; and any gesture or threat of violence exhibiting an intention to assault, with the means of carrying that threat into effect, will constitute an assault (*Addison*, 137).

Mere words do not amount to an assault. But the words which the party threatening uses at the time may either give to his gestures such a meaning as may make them

amount to an assault, or, on the other hand, may prevent them from doing so. For instance, where A laid his hands on his sword, and said to Z "if it were not the assize time\* I should not take such language from you" (*Tuberville v. Savage*, 1 Mod. 3). This was held not to be an assault, on the ground that the words showed that A did not intend *then and there* to offer violence to Z (in the language of the Penal Code, was not 'about to use criminal force' to Z). Here there was the menacing gesture, showing in itself an intention to use violence, there was the present ability to use violence, but there were also words which would prevent the person threatened from reasonably apprehending that the person threatening was really then and there about to use violence (per Arnould, C. J., in *Cama v. Morgan*, *sup.*).

A battery is the actual striking of another person, or touching him in a rude, angry, revengeful, or insolent manner. It consists in touching another's person hostilely or against his will, however slightly (*Rawlings v. Till*, 3 M. & W. 28). In *Cole v. Turner* (6 Mod. 149) Ho lt, C. J., declared : (1) that the least touching of another in anger is a battery ; (2) if two or more meet in a narrow passage, and without any violence or design of harm, the one touches the other gently, it will be no battery; and (3) if any of them use violence against the other, to force his way in a rude, inordinate manner, it will be a battery; or any struggle about the passage to such degree as may do hurt will be a battery.

Battery includes assault. It is mainly distinguishable from an assault in the fact that physical contact is necessary to accomplish it. It does not matter whether the

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\* It was the assize time, and the consequence of drawing a sword on another during assize time involved in those days (the latter end of Charles I's reign) not only the certain infliction of a heavy fine, but the possible chopping off of the hand by which the sword was drawn.

force is applied directly or indirectly to the human body itself or to anything in contact with it ; nor whether with the hand or anything held in it, or with a missile (*Pursell v. Horne*, 4 N. & P. 564).

But every laying on of hands is not a battery. The party's intention must be considered, for people will sometimes by way of joke or friendship clap a man on the back, and it would be ridiculous to say that every such case constitutes a battery (*William v. Jones*, Hard. 301).

**Assault.**—The accepted test is one laid down by *Tindal*, C. J., in *Stephen v. Myers* (4 C. & P. 349), in which the plaintiff was chairman of a parish meeting ; the defendant having been very vociferous, a motion was made and carried by a large majority, that he should be turned out. Upon this the defendant said he would rather pull the chairman out of the chair than be turned out of the room, and immediately advanced with his fist clenched towards him ; he was, therefore, stopped by the churchwarden, who sat next but one to the chairman, at a time when he was not near enough for any blow he might have meditated to reach the plaintiff ; but the witnesses said that it seemed to them that he was advancing with an intention to strike the chairman. The jury found for the plaintiff with one shilling damages. The learned Chief Justice said : “ It is not every threat, when there is no actual personal violence, that constitutes an assault ; there must in all cases be the means of carrying the threat into effect. The question, I shall leave to you will be, whether the defendant was advancing at the time in a threatening attitude, to strike the chairman, so that his blow must almost immediately have reached the chairman, if he had not been stopped. Then, though he was not near enough at the time to have struck him, yet if he was advancing with that intent, I think it amounts to an assault in law. If he was so advancing that, within a second or two of time, he would have reached the plaintiff, it seems to me it is an assault in law. If you think he was not advancing to strike the plaintiff, then only you can find your verdict for the defendant, otherwise you must find it for the plaintiff, and give him such damages as you think the nature of the case requires.” Where the defendant rode after the plaintiff so as to compel him to run into his garden for shelter to avoid being beaten ; it was held that an assault was committed (*Martin v. Shopper*, 3 C. P. 373). Where the defendant and his servants surrounded the plaintiff, who had refused to leave their workshop, and threatened to break his neck ; it was held that an assault was committed (*Read v. Coker*, 13 Q. B. 850). It is an assault to present an unloaded fire-arm, or any thing that looks like a fire-arm (*R. v. James*, 1 C. & K. 530) ; or a gun in a hostile manner

within shooting distance, although it may be at half-cock, because the cocking is a momentary operation (*Osborn v. Veitch*, 1 F. & F. 318). If a policeman handcuffs an unconvicted man, where there is no attempt to escape, and no reason to fear a rescue, it is an assault (*Wright v. Court*, 4 B. & C. 596); so, too, if a man forcibly takes chattel from the possession of another (*Green v. Goddard*, 2 Salk. 641). But it is no assault to touch a man in order to draw his attention to something, or pushing gently, through a crowd (*Coward v. Baddley*, 4 H. & N. 481). If a constable, when he has no power to arrest a person riding a bicycle after dark without a lamp, stops such a person by catching the handle-bar of his machine, causing him to fall, the constable is guilty of an assault (*Hatton v. Treesby*, 13 T. L. R. 556).

*Leading case.*—**Stephen v. Myers.**

**Battery.**—Such a seizing and laying hold as are necessary to restrain (*Rawlings v. Till*, 3 M. & W. 28); spitting in the face (*R. v. Cotesworth*, 1 Mod. 172); throwing over a chair or carriage in which another person is sitting (*Hopper v. Reeve*, 1 Taunt. 698); throwing water over a person (*Pursell v. Horn*, 8 A. & E. 602); striking a horse so that it bolted and threw its rider (*Dodwell v. Burford*, 1 Mod. 24); the removal of a person from one part of prison to another in which he could not be legally confined (*Cobbett v. Grey*, 4 Ex. 729); cutting off a pauper's hair, even for the sake of cleanliness and according to the rules of the workhouse (*Forde v. Skinner*, 4 C. & P. 239); taking a person by the collar by a constable (*Wiffin v. Kincard*, 2 B. & P. N. R. 471); causing another to be medically examined against his or her will; (*Latter v. Braddell*, 29 W. R. 239); firing a gun carelessly and hitting another, though the person firing never designed the shot to touch him (*Weaver v. Ward*, Hob. 131; *Leane v. Bray*, 3 East, 597), are all held to amount to battery.

*Leading case.*—**Cole v. Turner.**

**Civil liability.**—The fact that a defendant has been fined by a criminal Court for an assault is no bar to a civil action against him for damages (*Akhil Chandra Biswas v. Akhil Chandra Dey*, 6 C. W. N. 915; *Jodhi Ram v. Abdul*, 13 A. W. N. 62; *Chandan v. Sumera*, 7 A. W. N. 104). The previous conviction of the defendant in a criminal Court is no evidence of the assault. The *factum* of the assault must be tried in the civil Court (*Ali Buksh v. Sheikh Samiruddin*, 4 B. L. R. A. C. 31; *Bishonath v. Haro Gobind*, 5 W. R. 27). A plea of guilty in a criminal Court may, but

a *verdict* of conviction cannot, be considered in evidence in a civil case (*Shumboo Chunder v. Modhoo*, 10 W. R. 56).

**Mayhem** is a bodily harm whereby a man is deprived of the use of any member of his body or of any sense which he can use in fighting to defend himself or annoy his enemy, or by reason of which he is generally and permanently weakened (Hawk. P. C. i. 44; Stephen, Arts. 227; *R. v. Sullivan*, C. & M. 209). It is assault and battery of such an aggravated character as to amount to an actual wounding of the person, *e. g.*, cutting off, disabling, or weakening, a hand or finger, striking out an eye or foretooth, breaking a bone, or injuring the head, or wounding a sinew (*Bacon*).

When the assault has been carried to the extent of maiming or crippling, or of wounding a person, the damages will be greater than those awarded for a mere assault or battery.

**Justifications.**—Assault and battery may be justified in the following cases:—

1. Self-defence. The force used must not be more than is necessary under the circumstances. The battery justified must have been committed in actual defence, and not afterwards and in mere retaliation (*Cockroft v. Smith*, 11 Mod. 43). A man may justify himself on the ground of defending his wife, child, servant, and even his friend. A wife may justify in defence of her husband, a child of a parent, and a servant of his master. In such cases the act must not have been by way of revenge, but in order to prevent an injury (*Collett*).

***Son assault demesne.***—It is a principle of plain common sense that a man when attacked should be permitted to defend himself. The plea of *son assault demesne* means that the assault complained of was the effect of the plaintiff's own attack; that is, the blow was given in defending the party's person, family,

or property from the trespass of the plaintiff. But the defendant is justified only in making *defence*; and if he replied to the plaintiff's assault or trespass with a force and spirit altogether disproportionate to the provocation, the plaintiff may reply *de injuria sua propria*. This excess of force is, as it were, a new assault. And therefore it is that in connection with *son assault demesne* the defendant's plea says, *molliter manus imposuit*, he gently laid his hands upon the plaintiff. This is a good plea, because it shows that the defendant has not used more force than was necessary in resisting the plaintiff. If, however, the action be for an assault and battery and *wounding*, this plea would not be good, for it would not justify the wounding (*Dean v. Taylor* 11 Ex. 68—*Ball*).

2. In defence of the possession of a house, or goods and chattels. If one man enters the house of another with force and violence, the owner may justify in turning him out without a previous request to depart; but if he enters quietly, he must be first requested to retire before hands can be lawfully laid upon him to turn him out.

3. To prevent a forcible entry or seizure of chattels. A servant, after request and refusal to deliver, may justify the use of force to recover possession of his master's goods which a wrong-doer is removing, no needless violence being used, but when the removal is perfected, neither master nor servant ought to be allowed to justify a breach of the peace to enforce their rights (*Anthony v. Haney*, 8 Bing. 186).

4. For the correction of a pupil, child, apprentice, or sailor on board a ship. Here the chastisement must not be excessive or unreasonable.

5. By leave and license of the party injured.

6. In the preservation of the public peace. Here the force used should not be more than what is necessary.

Where a railway traveller lost his ticket and could not produce it when required so to do in accordance with an endorsed condition, and refused to pay over again; it was held that this did not justify the company in forcibly



ejecting him (*Butler v. M. Ry.*, 21 Q. B. D. 207). A shop keeper is not bound to sell goods at the prices marked over them, and if one enters a shop and insists on having the goods and refuses to leave the shop, the shopkeeper may, after request to depart, use force to turn out the disorderly person (*Timothy v. Simpson* 1 C. M. & R. 757). An innkeeper may turn out a disorderly person though there is no actual breach of the peace (*Howell v. Jackson*, 6 C. & P. 725).

*Indian case.*—Where the plaintiff committed a trespass by riding in the train without a ticket, and was assaulted and forcibly removed, the assault and forcible removal were held to be justifiable by the fact of the plaintiff being a trespasser (*Protab Daji v. B. B. & C. I. Ry.*, 1 Bom. 52).

*Leading case.*—**Dean v. Taylor.**

**Menace.**—Menace without assault is in some cases actionable. But this is on the ground of its causing a certain special kind of damage; and then the person menaced need not be the person who suffers damage. Verbal threats of personal violence are not, as such, a ground of civil action at all. If a man is thereby put in a reasonable bodily fear he has his remedy, but not a civil one, namely, by security of the peace (*Pollock*, 215).

**Damages.**—Damages in actions for assault and battery will vary according to the circumstances of each case. But generally the damages should be exemplary.

The circumstances of time and place as to when and where the assault was committed, and the degree of personal insult, must be considered in estimating the nature of the offence and the amount of damages. It is a greater insult to be beaten in a public place than in a private room. Provocation may be shown by way of mitigation, or that the blow was unintentional and an apology was offered; so previous threats by the defendant may be proved as an aggravation of the assault. When the assault is accompanied by a false charge, affecting the honour, character, and position in society, of the plaintiff, the offence will be greatly aggravated, and the damages proportionately increased. But if punishment in person is resorted to that must

always be an important element in mitigation in subsequently estimating the amount of damages (*Misir Ramji v. Jiwan Ram*, 1 A. W. N. 131). The plaintiff's position should be considered for the purpose of seeing how far the compensation awarded is commensurate with the injury inflicted (*Joypal Roy v. Makhoond Roy*, 17 W. R. 280). Damages should be commensurate to the injury and annoyance caused, even though there has been no serious personal injury (*Ramjoy v. Russell*, (1864) W. R. 370).

If two assault another, and one beats violently and the other a little, each is responsible for all the damage received from both; and the criterion of the damages is the injury sustained, and not the act or motives of the most guilty, or the least guilty of the defendants. Probable future damage should be considered, for, if the plaintiff has once recovered for an assault, though it be slight, he can have no fresh action for a subsequent new damage resulting from the same act (*Clerk v. Newsam*, 1 Ex. 131—*Collett*).

Where there has been no serious injury, still damages commensurate to the injury and annoyance caused should be awarded (*Ramjoy v. Russell*, W. R. 1864, 370). Where the damages awarded in compensation for an assault were beyond the means of the defendant, the Court reduced them on the defendant's tendering a written apology to the plaintiff, expressing his regret for what had passed (*MacIver v. Shungeshur Dutt*, 6 W. R. 95). A plaintiff may be entitled to substantial damages for being beaten with a shoe, notwithstanding that he may not have lost his caste, or sustained a pecuniary loss, or physical injury by the act complained of (*Bhyram Pershad v. Isharee*, 3 N. W. P. 313).

An assault made by parties proceeding together and acting in conjunction as to time, place and assault, is a single act, and the cause of action is common to all the parties (*Ramessur v. Shibnaram*, 14 W. R. 419).

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## CHAPTER XII.

### FALSE IMPRISONMENT.

FALSE IMPRISONMENT is a trespass committed by one man against the person of another, by unlawfully arresting him, and detaining him without any legal authority (*Addison*). It consists in the imposition of a *total* restraint for some period, however short, upon the liberty of another, without sufficient legal authority. A *partial* obstruction of his will, as the prevention of his going in one direction or in all directions but one, does not constitute an imprisonment (*Bird v. Jones*, 7 Q. B. D. 743). The restraint may be either physical or by mere show of authority. Actual contact is not necessary. Thus, to constitute this wrong two things are necessary:—(1). the detention of the person either (*a*) actual, *e. g.*, laying hands upon a person; or (*b*) constructive, *e. g.*, by an officer telling anyone that he is wanted and making him accompany: (2). the unlawfulness of such detention.

Every confinement of the person is an imprisonment whether it be in a common prison or a private house, or in the stocks, or by forcibly detaining any one in the public streets (*Blackstone*). A prison may have its boundary large or narrow, invisible or tangible, actual or real, or indeed in conception only; it may be in itself moveable or fixed; but a boundary it must have, and from the boundary that party imprisoned must be prevented from escaping; he must be prevented from leaving the place within the limits of which the party imprisoned could be confined (per Coleridge, C. J., in *Bird v. Jones*, 7 Q. B. D. 742). A man is not imprisoned who has an escape open

to him. False imprisonment assumes an entire restriction of free motion ; and hence it involves a notion of boundary or circumscribing limits ; not that these need necessarily be physically defined if they are actually constituted by the effectual control of a power and will exterior to one's own (*Collett*). The retaining of a person in a particular place, or the compelling him to go in a particular direction by force of an exterior will overpowering or suppressing in any way his own voluntary action, is an imprisonment on the part of the person exercising that exterior will (*Paran kusam v. Stuart*, 2 M. H. C. 396).

The plaintiff need only prove the detention or imprisonment.

Action for a false imprisonment lies against the plaintiff's attorney, who sues out an illegal and void *ca. sa.* against the defendant, and delivers it himself to the officer, who by his order arrests the defendant thereon (*Barker v. Braham and Norwood*, 2 W. Bl. 866). Where a party lays a complaint before a Magistrate on a subject matter over which he has a general jurisdiction, and the Magistrate grants a warrant upon which the party charged is arrested, the party laying a complaint is not liable as a trespasser, although the particular case be one in which the Magistrate had no authority to act. But, where the complainant having accompanied the constable charged with the execution of the warrant, pointed out to him the person to be arrested, it was held that this was evidence of a participation in the arrest (*West v. Smallwood*, 3 M. & W. 418). Suspicion of a party having committed a misdemeanour on a former occasion, is no justification for giving him in charge to a constable without a Justice's warrant ; and there is no distinction in this respect between one kind of misdemeanour and another, as breach of the peace and fraud (*Fox v. Gaunt*, 3 B. & Ad. 798).

Where a bailiff tells a person that he has a writ against him and thereupon such person peaceably accompanies him, that constitutes an imprisonment (*Grainger v. Hill*, 4 B. & C. 212 ; *Harvey v. Mayne*, 6 Ir. R. C. L. 417). Where a jailor acts upon a writ or order of a competent Court, which is *prima facie* valid, he is not liable if it subsequently turns out that the order was wrong (*Greaves v. Keene*, 4 Ex. D. 73 ; *Henderson v. Preston*, 21 Q. B. D. 362). But where the order shows on the face of it that the prisoner was committed under a statute which expressly casts on the jailor the duty of releasing the prisoner after a specified time unless the party on whose motion the prisoner was committed brings the prisoner to the bar of the Court, then

the jailor will be liable unless he so releases the prisoner (*Moore v. Rose*, L. R. 4 Q. B. 486). Where two policemen hindered defendant from going on a portion of a public footway on a bridge which was appropriated by seats to view a regatta, it was held that there was no imprisonment committed by the policemen (*Bird v. Jones*, 7 Q. B. D. 742). A passenger on the London & S. W. Ry. on arrival at Totton Station, refused to give up his ticket, on the ground that he had been misinformed by a porter at Waterloo as to the destination of the train, and required his ticket in order that he might make a claim against the company. The local station-master thereupon refused to allow him to leave, and although he tendered his name and address, detained him for some hours. He subsequently sued the company and the station-master to recover damages for alleged false imprisonment. The jury gave him the verdict and assessed the damages at £100, whilst the Judge intimated that the public were indebted to any one who brought a case of this kind forward because it was occasionally necessary to show the officers of the companies that they were not entitled to take the law into their own hands (*Unrep. Eng.* 1897).

*Indian cases.*—Where a wrong person is arrested and imprisoned under a decree to which he was no party, the person setting the Court in motion is not liable for such arrest and imprisonment if he did not obtain the process fraudulently or improperly (*Bheema v. Donti*, 8 M. H. C. 38). Where the defendant, a commanding officer of a Regiment, had unlawfully caused the plaintiff, a contractor, to be arrested and kept in confinement on the reasonable suspicion of fraud entertained against him, believing himself to be lawfully in possession of the authority to do so and did not act in malice or conscious violation of the law, nor for the furtherance of any unlawful purpose, but failed to establish the fraud imputed. Held, that the plaintiff under the circumstances was entitled to substantial damages (*Patton v. Huree Ram*, 3 Agra H. C. 409). A zemindar who discharged some of his officers and placed them under personal restraint was held liable to pay compensation in damages for the wrong inflicted (*Rajah Pedda Venkatapa v. Arovala*, 2 M. I. A. 504). Where the plaintiff's imprisonment took place under a warrant of the Bombay Small Cause Court issued in a regular manner, and such Court being of competent jurisdiction, the plaintiff was held to have no cause of action against the bailiff who arrested him, as there was no bad faith, fault, or irregularity, on the part of the bailiff so as to make him responsible for the wrongful arrest (*Fisher v. Pearse*, 9 Bom. 1). Where a false charge led to a party being prevented going to his house until he had furnished bail, he was held to have suffered inconvenience and loss of reputation, for which an award of Rs. 20 as damages was not unreasonable (*Madhub Chunder Sircar v. Banee Madhub*, 15 W. R. 85).

*Leading cases.*—**Barker v. Braham ; West v. Smallwood ; Fox v. Gaunt.**

*Arrest and imprisonment by private persons and public officers.*

False imprisonment may also arise from the arrest or detention of a person by (1) a private person, or, (2) an officer without warrant, or by an illegal warrant, or by a legal warrant executed at an unlawful time.

Where an arrest can only lawfully be made by a warrant the person arresting must have it with him at the time, ready to be produced if demanded (*Gilliard v. Loxton*, 31 L. J. M. C. 123). But there are a few exceptions to these principles.

A private person may *without* warrant arrest—

1. A person whom he sees committing, or about to commit, a breach of the public peace, but not if the affray be over and not likely to recur (*Timothy v. Simpson*, 1 C. M. & R. 757).

2. A dangerous lunatic, who seems disposed to do mischief to himself or to any other person.

3. A person for whom he has become bail, in order to give him up in his discharge (*Ex parte Eyre*, 3 Stark. 132).

4. In certain cases, depending upon relationships. A parent may lock up his child, a master his apprentice, and a ship-master his crew and passengers.

5. Under the provisions of section 59 of the Criminal Procedure Code (Act V of 1898).

Plaintiff entered defendant's shop to purchase an article in the shop, when a dispute arose between the plaintiff and defendant's shopman, and the plaintiff refusing on request to go out of the shop, the shopman endeavoured to turn him out, and an affray ensued between them. The defendant came into the shop during the affray, and requested the plaintiff to leave the shop quietly; but on his refusing to do so, the defendant gave him in charge to a policeman, who took him to a station-house. Held, that the defendant was justified, under the circumstances, in giving the plaintiff in charge to a policeman, for the purpose of preventing a renewal of the affray (*Timothy v. Simpson*, 1 C. M. & R. 757). In an action for false imprison-

ment, the defendant justified on the ground that the plaintiff had been his lodger, and after she had left her apartments, he discovered that some feathers were missing from a bed which he had occupied, and he, suspecting her to be the person who had stolen them, caused her to be apprehended, &c. Held, that as the defendant had taken the law into his own hands it was incumbent on him to make out not only that a felony had been committed, but that the circumstances of the case were such that any reasonable person would fairly have suspected the plaintiff of being the person who had committed it (*Allen v. Wright*, 8 C. & P. 522).

*Leading cases.*—**Timothy v. Simpson**; **Allen v. Wright**.

A public officer may arrest *without* warrant in the following cases: see ss. 4 (f), 54, 55, 57, 64, 65, 480 and 485 of the Criminal Procedure Code (Act V of 1898).

A constable is not justified in arresting a supposed offender for felony, without warrant, at the instigation of a third party, unless there exists a reasonable charge and suspicion (*Hogg v. Ward*, 3 H. & N. 417).

*Leading case.*—**Hogg v. Ward**.

**Damages.**—The expenses incurred to regain freedom from false imprisonment may be calculated in awarding damages. The remarks made under assault equally apply here.

When a judicial officer is liable for a false imprisonment, he is liable for all the usual and ordinary injurious consequences thereof, such as hand-cuffing, cutting off the hair, payment of penalties, fees, and all such expenses as are reasonably necessary to enable the plaintiff to procure his liberty; but he is not liable for any unnecessary or excessive violence on the part of the officers executing the warrant (*Mason v. Barker*, 1 C. & K. 100—*Collett*).

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## CHAPTER XIII.

### DEFAMATION.

EVERY man has an absolute right to have his reputation preserved inviolate. This right of reputation is acknowledged as an inherent personal right of every person. It is a *ius in rem*, a right absolute and good against all the world. A man's reputation is his property, and, if possible, more valuable than other property (per Malins, V. C., in *Dixon v. Holden*, L. R. 7 Eq. 492). Indeed, if we reflect on the degree of suffering occasioned by loss of character, and compare it with that occasioned by loss of property, the amount of the former injury far exceeds that of the latter (per Best, C. J., in *De Crespigny v. Wellesley*, 5 Bing. 406).

The wrong of defamation may be committed either by way of speech, or by way of writing, or its equivalent. The term 'slander' is used for the former kind of utterances, 'libel' for the latter. Slander is a spoken, and libel is a written, defamation.

A libel consists in the publication of a false and defamatory statement, expressed in printing or writing, or by signs, pictures, &c., tending to injure the reputation of another, and thereby exposing such person to public hatred, contempt, or ridicule. Everything, printed or written, which reflects on the character of another, and is published *without lawful justification or excuse*, (*i. e.*, maliciously, as it is sometimes said) is a libel, *whatever* the intention may have been (*O'Brien v. Clement*, 15 M. & W. 432; *De Renzy v. Griffin*, P. R. 8 of 1870).

A slander is a false and defamatory verbal statement tending to injure the reputation of another.



**Distinctions between Libel and Slander.**—1. Libel is a criminal offence as well as a civil wrong. Slander is a civil wrong only; though the words may happen to come within the criminal law as being blasphemous, seditious, or obscene, or as being a solicitation to commit a crime, or as being a contempt of Court (per Lush, J., in *R. v. Holbrook*, 4 Q. B. D. 46).

2. In a case of libel the law presumes that the person defamed has suffered damage, and, in the absence of legal justification or excuse, it is wrongful as against the person defamed. A libel is of itself an infringement of a right and no actual damage need be proved in order to sustain an action. Slander is actionable only when special damage can be proved to have been its natural consequence, or when it conveys certain imputations.

3. Libel is addressed to the eye, slander to the ear.

4. In the case of libel the defamatory matter is in some permanent form—in writing or printing, *e.g.*, a statue, effigy, caricature, signs or pictures, marks on a wall. Slander is in its nature transient, and is in the form of spoken words or significant gestures (*King v. Lake*, 2 Vent. 28; *Hardes* 470; *Kelly v. O'Malley*, 6 T. L. R. 64).

5. A slander may be uttered in the heat of the moment, and under a sudden provocation; the reduction of the charge into writing and its subsequent publication in the permanent form of a libel show greater deliberation and raise a suggestion of malice (*Bradley v. Methwyn*, Selw. N. P. 982; *Cook v. Ward*, 6 Bing. 409; *Dalby v. Newnes*, 3 T. L. 393). An action may be maintained for words written, for which an action could not be maintained if they were merely spoken (*Thorley v. Lord Kerry*, 3 Camp. 214).

6. The actual publisher of a libel may be an innocent porter or messenger, a mere hand, unconscious of the nature of his act, and for which therefore his employers

shall be held liable, and not he. Whereas in every case of the republication of a slander, the publisher acts consciously and voluntarily; the repetition is his own act (*Odgers*). He is, therefore, liable.

A man may be guilty both of libel and of slander at the same moment and by the same act, as, by reading to a public meeting a defamatory paper written by another (*Hearne v. Stowell*, 4 P. & D. 696).

### *Libel.*

In order to found an action for libel it must be proved that the statement complained of is—(1) false, (2) defamatory, and (3) published.

1. **False.**—The plaintiff must allege the falsity of the imputation conveyed by the writing, picture, or words. If a man is proved to have stated that which he knew to be false no one need inquire further. Every body assumes thenceforth that he was malicious, that he did a wrong thing from some wrong motive (per Brett, L. J., in *Clark v. Molyneux*, 3 Q. B. D. 247; *Ratan v. Bhaga*, (1896) P. J. 376; see *Dhurmo Doss v. Koylash*, 12 W. R. 372).

2. **Defamatory.**—(a) In cases of libel, any words will be deemed defamatory which expose the plaintiff to hatred, contempt, ridicule, or obloquy, which tend to injure him in his possession or trade, or cause him to be shunned or avoided by his neighbours.

In order to determine whether a statement is defamatory it must be construed in its natural and ordinary meaning; if not defamatory in such meaning, it must be construed in the special meaning, if any, in which it was understood by the persons by whom and to whom it was published (*Capital & Counties Bank v. Henty*, 7 App. Cas. 741).

If the word is an ordinary English word, then the Court will construe it in its natural meaning, unless some other is shewn to have been given it. If the word is a cant expression or a commercial term (*Smith v. Jeffreys*, 15 M. & W. 561) then the meaning may depend upon the circumstances in evidence (per Bramwell, B., in *Barnett v. Allen*, 27 L. J. Ex. 414). The burden of proof is on the party who alleges that the words were understood in a meaning other than their natural and ordinary meaning.

Where the words are not *prima facie* defamatory, but the plaintiff intends to maintain that the words were defamatory by reason of their being understood in a special sense, he must insert an averment, called an *innuendo*, from the old form of pleading. It is the office of an *innuendo* to define the defamatory meaning which the plaintiff sets on the words; to show how they come to have that defamatory meaning; and also to show how they relate to the plaintiff, whenever that is not clear on the face of them (*Odgers*). No *innuendo* is necessary where the words complained of are defamatory in their ordinary meaning.

The mere intention to vex and annoy will not make language defamatory which is not so in its own nature. An imputation of conduct not in itself really censurable, however distasteful or objectionable the conduct may be according to the notion of certain people, is not a legal injury (*Clay v. Roberts*, 6 L. T. N. S. 398).

(b). The defamatory words must refer to some ascertained or ascertainable person, and that person must be the plaintiff (*Odgers*).

If a man wrote that all lawyers were thieves, no particular lawyer could sue him unless there is something to point to the particular individual (per Willes, J., in *Eastwood v. Holmes*, 1 F. & F. 349). And provided that the

plaintiff can satisfy the jury that he was especially referred to, it is sufficient whether the words complained of describe him by his own name, or its initial letter (*Roach v. Garvan*, 2 Atk. 469; *O'Brien v. Clement*, 15 M. & W. 435), or by asterisks (*Bourke v. Warren*, 2 C. & P. 307), or by a fictitious name (*R. v. Clerk*, 1 Barn. 304), or by the name of somebody else (*Levis v. Milne*, 4 Bing. 195), or merely refer to a definite body of persons of which he is a member, for "if those who look on know well who is aimed at, the very same injury is inflicted, the very same thing is in fact done, as would be done if his name and Christian name were ten times repeated" (per Lord Campbell, C. J., in *Le Fanu v. Malcolmson*, 1 H. L. 688). But where it is uncertain whether the plaintiff was the particular individual aimed at, no action lies, *e. g.*, where after the trial of an action at which there were three witnesses, the defendant said, "one of you three has perjured," it was held that no action lay, as there was nothing to show that the plaintiff was the particular witness referred to (*Fraser, L. & S.*, 5, 6).

(c). Further the words complained of must concern the plaintiff. They must affect his character or touch him in the way of his office, profession, or trade. If they are directed solely at the plaintiff's goods, or his title to property, though an action may lie therefor, it is not an action of libel or slander, but "an action on the case for special damages sustained by reason of the speaking or publication" (per Tindal, C. J., in *Malachy v. Soper*, 3 Bing. N. C. 384). In some cases, however, an attack on a man's title to property or goods may also injuriously affect his reputation. Thus, it is libellous to write and publish of a bookseller that he sells immoral poems (*Tabart v. Tipper*, 1 Camp. 350), and to say of a wine merchant that his wine is poisoned, or of a tea-dealer that his tea is made

green by drying it on copper (*Ingram v. Lawson*, 6 Bing. 216—*Fraser, L. & S.*, 3). To impute to any one who holds an office or profession that he is unfit therefor, or that he has acted improperly therein, is libellous.

No one can be libelled in respect of an office which he has ceased to fill, or a vocation which he has ceased to follow, but imputations against a man in some particular relation may also affect him in his general character. If it be alleged of a retired solicitor, that he was guilty of sharp practice in his profession, he is not libelled as a solicitor, for he is no longer one, but he is libelled as a man, for he is accused of dishonesty (*Boydell v. Jones*, 4 M. & W. 450).

**Judge and Jury**—In England, it is for the Judge to say whether the words are capable of a defamatory meaning, but for the Jury to say whether under the circumstances of the case they in fact bear that meaning (*Capital & Counties Bank v. Henty*, 7 App. Cas. 747).

It is libellous to write and publish of a man that he is an infernal villain (*Bell v. Stone*, 1 B. & P. 331); an insane (*Morgan v. Lingen*, 8 L. T. 800); a hypocrite (*Thorley v. Lord Kerry*, 4 Taunt. 355); an insolvent or impecunious (*Metr. Omnibus Co. v. Hawkins*, 2 H. & N. 87); a dishonest man (*Austin v. Culpepher*, Skin. 123); an impostor (*Campbell v. Spottiswoode*, 3 B. & S. 769; *Cooke v. Hughes*, R. & M. 112); a man of gross misconduct (*Clement v. Chivis*, 9 B. & C. 172); a frozen snake (*Hoare v. Silverlock*, L. R. 12 Q. B. 624); an itchy old toad (*Villers v. Monsley*, 2 Wils. 403); a man of straw (*Eaten v. Jones* 1 Dowl. N. S. 602); ungrateful (*Cox v. Lee*, 4 Ex. 384); cheating at dice (*Greville v. Chapman*, 5 Q. B. 744); unfit to be trusted with money (*Cheese v. Scales*, 10 M. & W. 488); or a great defaulter (*Warman v. Hine*, 1 Jur. 820).

It is libellous to publish that certain quack medicines were prepared by a physician of eminence (*Clark v. Freeman*, 11 Beav. 117); or a newspaper proprietor is 'a libellous journalist' (*Wakely v. Cook*, 4 Ex. 518); or a barrister is 'a quack lawyer and a mountebank' and 'an impostor' (*Wakely v. Healey*, 7 C. B. 591; *Sir W. Garrow's case*, 3 Chit. Cr. L. 884).

An obituary notice of a living person (*McBride v. Ellis*, 9 Mich. 313); and an ironical praise (*Boydell v. Jones*, 1 H. & H. 408; *R. v. Brown*, Holt 425; *Sir Baptist Hick's case*, Poph. 139) may be libels. A caricature or scandalous painting (*Du Bost v. Baresford*, 2 Camp. 511); a chalk-mark

on a wall (*Mortineer v. McCallan*, 6 M. & W. 58; *Tarpley v. Blaby*, 7 C. & P. 395); burning a man in effigy (*Eyre v. Garlick*, 42 J. P. 68); a statute (Hawkins P. C.); a gallows at the doorway of some obnoxious person (*Carr v. Hood*, 1 Camp. 355) may become libels. The exhibition of the waxen effigy of a person who has been tried for murder and acquitted, in company with the effigy of notorious criminals, may be defamatory, because this shows that although not found guilty he was a criminal himself (*Monson v. Fussand* (1894) 1 Q. B. 254).

To publish falsely on placards or newspapers, or through the medium of letters, or writings, of a publican, that his license has been refused (*Bignell v. Buzzard*, 3 H. & N. 217), or of a tradesman that he knowingly sells bad articles, or of a gun-smith or manufacturer, that he is a bad workman and unable to turn out a good one is actionable; but mere puffs between rival tradesman, the one depreciating the other's wares and exalting his own above them, are defensible (*Harman v. Delany*, 1 Barnard 259; Fitz. 121; *Evans v. Harlow*, 5 Q. B. 624; *Heriot v. Stuart*, 1 Esp. 437; *Young v. Macrae*, 3 B. & S. 264), even though the statements are untrue and cause loss to others (*Hubbuck & Co. v. Wilkinson & Co.*, (1899) 1 Q. B. 86). Inserting the plaintiff's name under the head of "First meetings under the Bankruptcy Act" was held to be libellous, because it showed that the plaintiff had become a bankrupt or taken proceedings in liquidation (*Shepherd v. Whitaker*, L. R. 10 C. P. 502). Where a trade journal published a list headed 'County Court Judgments,' in which appeared a judgment against the plaintiff, which had, in point of fact, been discharged, although it remained on the County Court Register, it was held that although it was true that there was such a judgment, yet there was evidence from which it might be inferred that it remained undischarged, and that consequently the plaintiff was a person in bad credit (*Williams v. Smith*, 22 Q. B. D. 134). Had the trade journal appended a note, that its readers were not to assume that the judgments in the list remained unsatisfied, the decision would have been the other way (*Scarles v. Scarlett*, (1892) 2 Q. B. 56).

*Indian cases.*—Making and publicly exhibiting an effigy of a person, calling it by the person's name, and beating it with shoes, are acts amounting to defamation of character for which a suit for recovery of damages will lie (*Pitumber Doss v. Dwarka Pershad*, 2 N. W. P. 435). The mere failure of a complainant in proving a *bona fide* criminal charge does not make him liable to an action for damages for defamation (*Brojonath v. Kishen Loll*, 5 W. R. 282). Defendant falsely and maliciously published statements to the effect that plaintiff's wife was a woman of low caste, between which and the plaintiff's own caste intermarriage and intercourse of any kind were prohibited: upon this the plaintiff's brotherhood

expelled him and his wife from caste. Held, that the above facts furnished ample grounds for an action for defamation (*Sant v. Bhag Mal*, P. R. 140 of 1882).

*Leading case.*—**Capital & County Bank v. Henty.**

3. **Publication.**—The making known, knowingly or negligently, of a libel or slander to any person, other than the object of it, is publication in its legal sense. “If the statement is sent straight to the person of whom it is written, there is no publication of it” (per Esher, M. R., in *Pullman v. Hill*, (1891) 1 Q. B. 527). For that cannot injure his reputation, though it may injure his self-esteem. A man’s reputation is the estimate in which others hold him, not the good opinion which he has of himself. Hence, the words complained of should be communicated to some person other than the plaintiff (*Barrow v. Lewellin*, Hob. 62; *Pullman v. Hill*, *sup.*)

The fact that the defendant desired and intended publication to a third person is not a sufficient ground for an action. The plaintiff must prove a publication in fact, and not merely in intention. There is no publication if the person into whose hands a libellous communication has come has never read it (per Lord Herschell, in *Browne v. Dunn* (1893), 6 R. 67).

Again, the publication must be without just cause or without excuse (*i. e.*, malicious as it is sometimes called), or on an “unprivileged occasion.”

“That unfortunate word ‘malice’ has got into cases of actions for libel. We all know that a man may be the publisher of a libel without a particle of malice or improper motive. Therefore the case is not the same as where actual and real malice is necessary. Take the case where a person may make an untrue statement of a man in writing, not privileged on account of the occasion of its publication; he would be liable although he had not a particle of malice

against the man" (per Lord Bramwell, in *Abrath v. N. E. Ry.*, 11 App. 253). Again, "if a man is proved to have stated that which he knew to be false, no one need inquire further. Everybody assumes thenceforth that he was malicious, and that he did a wrong thing from some wrong motive" (per Brett, L. J., in *Clark v. Molyneux*, L. R. 3 Q. B. p. 247).

The law will infer malice where a statement is deliberately false in fact and injurious to the character of another, and the publication is not privileged (*Peter v. Dufour*, 6 W. R. 92).

The actionable or innocent character of words depends not on the intention with which they were published, but on their actual meaning and tendency when published, and the defendant will not be excused on the ground that he published the libel by accident or mistake (*Blake v. Stevens*, 4 F. & F. 232; *Shepherd v. Whittaker*, L. R. 10 C. P. 502), or in jest (*Donoghue v. Hayes*, Haye's Ir. Ex. Rep. 265), or with an honest belief in its truth (*Blackburn v. Blackburn*, 3 C. & P. 146).

**Judge and Jury.**—In England, as regards the question of publication, it is for the jury to find whether the facts on which it is endeavoured to prove publication are true, but for the Judge to decide whether the facts as proved constitute a publication.

**Publication.**—If the libel be contained in a telegram (*Whitfield v. S. E. Ry.*, E. B. & E. 115) or be written on a post-card (*Robinson v. Jones*, 4 L. R. Ir. 391; *Beamish v. Dairy Supply Co. Ltd.*, 13 T. R. 484), that is publication, eventhough they be addressed to the party libelled. It was never meant by the legislature that these facilities for postal and telegraphic communication should be used for the purpose of more easily disseminating libels. Where there is such a publication, it avoids the privilege, because it is communicated through unprivileged persons (per Brett, J., in *Williamson v. Freer*, L. R. 9 C. P. 393; *Chattel v. Turner*, 12 L. T. 360). The defendant sent a post-card through the post on an occasion which, as between the defendant and the person to whom it was sent, was privileged.



The statements contained in the post-card had reference to the plaintiff, and would, if connected with him, have been defamatory of him, but the post-card did not disclose the plaintiff's name or contain any indication that the statements in it referred to him. Held, that this was no publication (*Sadgrove v. Hole*, (1901) 2 K. B. 1). If the defendant knows that it is the habit of plaintiff's clerk to open his letters in his absence and in point of fact the clerk does open the letter, which contains the libellous matter, he will be liable (*Delacroix v. Thevenot*, 2 Stark. 63; *Gomersall v. Davies*, 14 T. R. 430). Dictating a libellous letter to a type-writer and giving it to an office boy to make a press-copy is publication (*Pullman v. Hill*, (1891) 1 Q. B. 524; *Gordon v. Street*, 69 L. J. Q. B. 45). But where a firm of solicitors, acting for a client, addressed a letter containing defamatory matter to the plaintiff, and the letter was dictated to their short-hand writer clerk, and copied into the press-book by another clerk in their employment; it was held that the occasion was privileged and the solicitors were not liable (*Boxsius v. Goblet*, (1894) 1 Q. B. 842).

Sending a defamatory letter to a wife about her husband is sufficient publication to sustain an action (*Wenman v. Ash*, 13 C. B. 836; *Jones v. Williams*, 1 T. L. R. 572), and it is submitted that similarly a communication to the husband of a charge against his wife is a sufficient publication (*Odgers*).

Where the plaintiff told some friends an absurd story about himself, and the defendant published it in his newspaper, simply for the purpose of amusing his readers, and believing that the plaintiff would not object; the defendant was held liable (*Cook v. Ward*, 6 Bing. 409). The plaintiff obtained £100, as damages against the defendants for the publication of a libellous statement, which had been inserted by mistake in a law book of which they were the publishers (*Blake v. Stevens*, 11 L. T. N. S. 543).

Where by the defendant's negligence a privileged communication, intended to be made to A, was in fact placed in an envelope directed to B, whereby the defamatory matter was published to B, the defendant was held liable, though there was no malice (*Hebditch v. MacIlvain*, (1894) 2 Q. B. 54; overruling *Thompson v. Dashwood*, 11 Q. B. D. 43).

*Indian case.*—The Trustees of the Port of Bombay, bound to keep minutes of their proceedings and resolutions and to forward copies of such minutes to the Secretary to the Local Government, passed the following resolution:—“Mr. Shepherd's (the plaintiff's) offer of Rs. 520 in full satisfaction of all claims should be accepted, but any further transactions with him should be avoided if possible.” Copies of this resolution, made by clerks in the employ of the Trustees, were recorded in two books kept in the office of the Trustees and other copies, also made by such clerks, were forwarded to the Secretary to the Local Government and the plaintiff himself. Held, (1) that the words of the resolution amounted in law to a libel; (2) that the act of

the Trustees in transmitting a copy to the Secretary was a publication of the libel ; but (3) that such publication was privileged (*Shepherd v. The Trustees of the Port of Bombay*, 1 Bom. 477).

A letter was written by order of the manager of a firm reflecting upon the character of a professional man, and signed by the manager and handed over in the ordinary way to a clerk in the office to copy in the office copy letter book, which was open to all the members of the firm. Held, that such instructions to copy amounted to publication (*Heckford v. Galstin*, 2 Hyde 274).

Where the defendant posted a newspaper (alleged to contain a libel upon the plaintiff) at Agra, addressed to C at Lahore, and the newspaper was delivered to C's servant at Lahore, and forwarded by him unopened to his master at Amritsar (where C was temporarily staying). Held, that the publication was at Lahore, and the civil Court at that place had jurisdiction to entertain the suit (*Dingo v. Kirby*, P. R. 33 of 1874).

**No publication.**—Where the defendant despatched a sealed letter through the post to the plaintiff it was held that there was no publication (*Barrow v. Levellin*, Hob. 62). The uttering of a libel by a husband to his wife is no publication, because in the eye of the law husband and wife are one person (*Wennhak v. Morgan*, 20 Q. B. D. 637; *Phillips v. Barnett*, 1 Q. B. D. 436). Similarly, if a husband write a libel and hand it to his wife, and she hand it to the person libelled, this is no publication to sustain an action for libel against the husband and his wife, they being but one person in law (*Folkard*).

*Indian cases.*—A brought an action against B for damages for libellous matter contained in a letter written and sent as an ordinary private letter by post by B to A. No publication was alleged or proved, and the only damage alleged was injury to A's feelings. Held, that no suit lay (*Kamal Chandra v. Nobin Chandra*, 10 W. R. 184; 1 B. L. R. 12; *Mahomed Ismail v. Mahomed Jahir*, 6 N. W. P. 38).

**Newspaper libel.**—If a libel appear in a newspaper, the proprietor, the editor, the printer, and the publisher, are liable to be sued, either separately or together. In all cases of joint publication each defendant is liable for all the ensuing damage. Where the libel is contained in a newspaper the sale of each copy of the newspaper containing the libel is *prima facie* a publication thereof, rendering the distributor as well as principal responsible for the libel. But the defendant is excused if he can prove (1) that he did not know that it contained a libel; (2) that his ignorance

was not due to any negligence on his own part; and (3) that he did not know, and had no ground for supposing, that the newspaper was likely to contain libellous matter (*Emmens v. Pottle*, 16 Q. B. D. 354). If he proves these three facts, he will not be deemed to have published it. In a recent case it has been remarked, though not expressly decided, that the doctrine of *Emmens v. Pottle* is only applicable where the defendant is a person who is not the printer or the first or main publisher of a work which contains a libel, but has only taken a subordinate part in disseminating it (per Romer, L. J., in *Vizetely v. Mudie's Select Library*, (1900) 2 Q. B. 170, 180).

Every sale of a newspaper to a person sent to purchase it is a fresh publication (*Lawless v. The Anglo Egyptian &c. Co.*, 10 B. & S. 226). If a man wraps a newspaper, and sends it into another country by a boy, the man who sends the paper is the publisher of it, and not the boy, who being ignorant of the contents of the newspaper, is the innocent agent in the transaction (*R. v. Burdett*, 4 B. & Ald. 126). The proprietors of a circulating library circulated copies of a book which, unknown to them, contained a libel on the plaintiff. In an action brought against them they failed to prove that it was not through negligence on their part that they did not know that the book contained the libel when they circulated it. Held, that they were liable as publishers of the libel (*Vizetely v. Mudie's Select Library*, *sup.*).

### *Slander.*

#### I. ENGLISH LAW.

As in the case of libel, it must be proved that the words complained of are (1) false, (2) defamatory, and (3) published. But in addition to these requisites it must be shewn that some special damage has, in fact, resulted from their use. Such special damage must again be a legal and natural consequence of the slander (*Vicars v. Wilcock*, 8 East 1). The loss complained of must be such as might fairly and reasonably have been anticipated from the slander (*Lynch v. Knight*, 9 H. L. 577), *e. g.*, the loss of a

client (*King v. Watts*, 8 C. & P. 614; *Brown v. Smith*, 22 L. J. C. P. 151), or customer (*Storey v. Challands*, 8 C. & P. 234), or the loss (*Payne v. Beuwmorris*, 1 Lev. 248) or refusal (*Sterry v. Foreman*, 2 C. & P. 592) of some appointment or employment (*Martin v. Strong*, 5 A. & E. 535; *Rumsey v. Webb*, 11 L. J. C. P. 129), or the loss of a gift whether pecuniary (*Corcoran v. Corcoran*, 7 L. R. Ir. 272), or otherwise (*Hartley v. Herring*, 8 T. R. 130), or of gratuitous hospitality (*Moore v. Meagher*, 1 Taunt. 39), for a dinner at a friend's expense is a thing of some temporal value (*Davies v. Solomon*, L. R. 7 Q. B. 112), or the loss of a marriage (*Davis v. Gardiner*, 4 Rep. 16) or of the consortium of one's husband is enough (*Lynch v. Knight*, 9 H. L. 589). Where the statement complained of "in its very nature is intended, or reasonably likely to produce, and in the ordinary course of things does produce, a general loss of business, as distinct from the loss of this or that known customer, evidence of such general decline of business is admissible," and is sufficient to support an action for slander (*Ratcliffe v. Evans*, (1892) 2 Q. B. 533).

The printing and publishing by a third party of oral slander renders the person who prints or writes and publishes the slander, and all aiding or assisting him, liable to an action, although the originator, who merely spoke the slander will not be liable (*McGregor v. Thwaites*, 3 B. & C. 35).

**Actionable.**—Where the plaintiff was chaplain to a peer, and the defendant falsely alleged of him that he had a bastard, whereby he lost the chaplaincy, it was held that the plaintiff was entitled to maintain an action for compensation in damages on the ground that the chaplaincy was a temporal preferment (*Payne v. Beuwmorris*, 1 Lev. 248). An action was brought by a trader, alleging that defendant falsely and maliciously spoke and published of his wife, who assisted him in the business, certain words accusing her of having committed adultery upon the premises where he resided and carried on his business, whereby he was injured in his business, it was held that it

was maintainable on the ground that the injury to his business was a special damage, the natural consequence of the words (*Riding v. Smith*, 1 Ex. D. 91).

**Non-actionable.**—To call a man a scoundrel; or a black-guard; or a swindler (*Savile v. Jardine*, 2 H. B. 531; *Ward v. Weeks*, 4 M. & P. 796); or a cheat (*Savage v. Robery*, 2 Salk. 694); or a rogue, a rascal, or a villain (*Stanhope v. Blith*, 4 Rep. 15); or a runagate (*Cockane v. Hopkins*, 2 Lev. 214); or a cozenor (*Brunkard v. Segar*, Hutt. 13); or a common-filcher (*Goodale v. Castle*, Cro. Eiz. 554); or to say of a man "you are a low fellow, a disgrace to the town, and unfit for decent society, on account of your conduct with whores" (*Lumbey v. Allday*, 1 Cr. & J. 310) is not actionable *per se*. Neither is it actionable to call a man a black-leg, unless it is shown that by the use of the term the defendant intended to impute to the plaintiff that he is a cheating gambler (*Barnett v. Allen*, 3 H. & N. 376); nor to say of a young lady that she is a notorious liar, an infamous wretch, and has been all but seduced by a notorious libertine (*Lynch v. Knight*, 9 H. L. 577). The words "he is a rogue and has cheated his brother-in-law of upwards of £2,000," are not actionable (*Hopwood v. Thorn*, 8 C. B. 313).

Where the plaintiff alleged that he had engaged Madame Mara to sing at his oratorio, and that the defendant published a libel concerning her, in consequence of which she was prevented from singing, from an apprehension of being hissed, whereby the plaintiff lost the benefit of her services; it was held that the injury complained of was too remote, and not to be connected with the cause assigned for it; that if the libel was injurious to Madame Mara, she might have an action for it, but her refusing to perform might have proceeded from groundless apprehension or mere caprice, and not from the publication of the libel; and the plaintiff therefore was non-suited (*Ashley v. Harrison*, 1 Esp. 48). So, where the plaintiff was the candidate for membership of a club, and was not elected on a ballot, and afterwards upon a meeting being called to consider the rules of the club, the defendant spoke certain words, not actionable in themselves, of the plaintiff, whereby he induced the majority of the members to retain the rules under which the plaintiff had been rejected, it was held that the damage was not pecuniary, and was incapable of being estimated in money, and was not the natural or probable consequence of the defendant's words (*Chamberlain v. Boyd*, 11 Q. B. D. 407).

An action of slander may be maintained, without proof of special damage, in the following cases:—

1. If a criminal offence (not necessarily an indictable offence) be imputed to the plaintiff (*Webb v. Bearan*, 11 Q. B. D. 609).

2. If a contagious or infectious disorder, tending to exclude the plaintiff from society, be imputed to him (*Villers v. Monsley*, 2 Wils. 403).

3. If any injurious imputation be made, affecting the plaintiff in his office, profession, trade, or business (*Starkie; Humphress v. Stanfield*, Cro. Car. 469).

4. If the plaintiff is a woman or girl, and the words impute unchastity or adultery to her (Slander of Women Act 1891, 54 & 55 Vic. c. 51).

In the above cases the imputation cast on the plaintiff is on the face of it so injurious that the Court will presume, without any proof, that his reputation has been thereby impaired. Spoken words which afford a cause of action without proof of special damage are said to be actionable *per se*.

1. **Crime.**—Where the words contain an express imputation of any crime or misdemeanour for which *corporal* punishment may be inflicted, they are actionable without proof of special damage. But where the penalty for an offence is merely *pecuniary*, it does not appear that an action will lie for charging it; even though in default of payment, imprisonment should be prescribed by the statute; imprisonment not being the primary and immediate punishment for the offence (*Odgen v. Turner*, 6 Mod. 104).

The offence need not be specified with legal precision, indeed it need not be specified at all if the words impute felony generally.

Words merely imputing suspicion of a crime are not actionable without proof of special damage (*Simmons v. Mitchell*, 6 App. Cas. 156). The allegation must be a direct charge of punishable crime (*Lemon v. Simons*, 57 L. J. Q. B. 260). If words charging crime are accompanied by an express allusion to a transaction which merely amounts to

a civil injury they are not actionable (*Thompson v. Barnard*, 1 Camp. 48).

It is not necessary that the words should accuse the plaintiff of some fresh, undiscovered crime, so as to put him in jeopardy or cause his arrest (*Odgers*).

**Actionable.**—A general charge of felony is actionable, though it does not specify any particular felony, *e. g.*, "I am thoroughly convinced that you are guilty of the death of F, and rather than you should go without a hangman, I will hang you," said after a verdict of not-guilty (*Peake v. Oldham*, W. Bl. 960; Cowp. 275); "if you had had your deserts, you would have been hanged before now" (*Donne's case*, Cro. Eliz. 62); "he deserves to have his ears nailed to a pillory" (*Jenkinson v. Mayne*, 1 Vin. Abr. 415); "you have committed an act for which I can transport you" (*Curtis v. Curtis*, 3 M. & S. 819); "you have done many things for which you ought to be hanged" (*Francis v. Roose*, 1 H. & H. 36); "you are a rogue, and I will prove you a rogue for you forged my name" (*Jones v. Hearme*, 2 Wils. 89); and "to call a person a felon," after he is discharged (*Leyman v. Latimer*, 3 Ex. D. 352).

Charges of specific felonies such as—assault with intent to rob (*Lewkor v. Churchley*, Cro. Car. 140); attempt to murder (*Scott v. Hilliar*, Lane 98); bigamy (*Heming v. Power*, 10 M. & W. 564); burglary (*Somers v. House*, Holt. 39); demanding money with menaces (*Neve v. Cross*, Sty. 350); embezzlement (*Williams v. Scott*, 1 C. & M. 675); forgery (*Baal v. Baggerley*, Cro. Car. 326); larceny (*Tomlinson v. Brittlebank*, 4 B. & A. 630); manslaughter (*Ford v. Primrose*, 5 D. & R. 287; *Edsall v. Russell*, 4 M. & G. 1090); murder (*Button v. Heyward*, 8 Mod. 24); receiving stolen goods knowing them to be so (*Briggs' case*, Godd. 157; *Clarke's case*, 2 Rolls Rep. 136; *Alfred v. Farlow*, 8 Q. B. D. 854); robbery (*Rowcliff v. Edmonds*, 7 M. & W. 13; *Lawrence v. Woodward*, 1 Roll. Abr. 74); treason (*Fry v. Carne*, 8 Mod. 283); and unnatural offences (*Colman v. Godwin*, 3 Doug. 90), were all held to be actionable. Similarly the charges of the following misdemeanours were held to be actionable: bribery and corruption (*Bendish v. Lindsay*, 11 Mod. 194); conspiracy (*Tibbott v. Hayes*, Cro. Eliz. 191); keeping a bawdy-house (*Huckle v. Reynolds*, 7 C. B. N. S. 114; *Brayne v. Cooper*, 5 M. & W. 250); libel (*Russell v. Ligon*, 1 Roll. Abr. 46); perjury (*Roberts v. Camden*, 9 East 93); soliciting another to commit a crime (*Deane v. Eton*, 1 Buls. 201); subornation of perjury (*Bridges v. Playdell*, B. & G. 2); the careless or unskilful administration of mercury or any other poisonous or dangerous drug, and thereby causing death (*Edsall v. Russell*, 4 M. & G. 1090).

*Indian case.*—Where a slander consisted of the statement that the plaintiff

iff had connection with the wife of a *mhar*, it was held that the defendant was liable as the defamatory words imputed to the plaintiff what amounted to an offence in India (*Ratan v. Bhaga*, (1896) P. J. 376).

**Not actionable.**—Saying of the plaintiff that he has foresworn himself, and that the defendant had three evidences that would prove it, is not actionable without showing that the words were spoken with reference to some judicial proceeding in which the plaintiff had been sworn (*Holt v. Scholefield*, 6 T. R. 691). Words imputing an impossible crime as, “thou hast killed my wife,” who was alive at the time, are not actionable (*Snag v. Gee*, 4 Rep. 16). To call a man a thief would *prima facie* be actionable without allegation of special damage; but if it be in evidence that the words were used merely as abuse and not as conveying the imputation of actual theft having been committed by the plaintiff, there is no cause of action (*Christie v. Cowell*, 1 Peake N. P. C. 5). Where the defendant called the plaintiff a “welcher (meaning a person who dishonestly appropriates and embezzles money deposited with him);” and the evidence showed that a “welcher” is a person who receives money which has been deposited to abide the event of a race, and who has a predetermined intention to keep the money for himself, it was held that, as the word did not necessarily impute the offence of embezzlement, it did not imply a criminal offence, and so was not actionable without special damage (*Blackman v. Bryant*, 27 L. T. 491).

*Leading cases.*—**Peake v. Oldham**; **Holt v. Scholefield**.

2. **Contagious disease.**—Words imputing to the plaintiff that he *has* an infectious or contagious disease are actionable without proof of special damage. For the effect of such an imputation is naturally to exclude the plaintiff from society. Such disease may be either leprosy, venereal disease (*Watson v. McCarthy*, 2 Kelly 57), or the plague; but not itch, falling sickness, or small-pox (*Villars v. Monsley*, 2 Wils. 403), which are less infectious. The words must distinctly impute that the plaintiff *has* the disease at the *time of speaking them*: an assertion that he *has had* such a disease would not cause him to be shunned by society and the gist of the action fails (*Taylor v. Hall*, 2 Str. 1189; *Bloodworth v. Gray*, 7 M. & G. 334; *Carslake v. Mapledoram*, 6 T. R. 473).

*Leading case.*—**Carslake v. Mapledoram**.



3. **Office, profession, or trade.**—Where words spoken of affect a plaintiff in his office, profession, or trade, and directly tend to prejudice him therein, no further proof of damage is necessary. It must be shown that he held such office, or was actively engaged in such profession or trade at the time the words were spoken (*Bellamy v. Burch*, 16 M. & W. 590). Otherwise, proof of special damage will be required. The words spoken must impeach his official or professional conduct or his skill or knowledge. His special office or profession need not be expressly named or referred to, if the charge made be such as must necessarily affect him in it. If a certain degree of ability, skill or training be essential to the due conduct of the plaintiff's office or profession, words denying his skill and ability, or disparaging his training, are actionable; for they imply that he is unfit to continue therein. But words which merely charge the plaintiff with some misconduct outside his office, or not connected with his special profession or trade, will not be actionable.

*Office, paid and honorary.*—A distinction exists between an office of profit and an office which is purely honorary. In the former case an action lies without proof of special damage for any words which impute to the holder thereof—(1) serious misconduct in the discharge of his official duties; (2) any misconduct, which, if proved against him, would be ground for depriving him of his office, whether such misconduct occur in the course of his official duties or not; and (3) general unfitness or incapacity for his office, such as want of the necessary ability, or lack of knowledge or education (*Booth v. Arnold* (1895) 1 Q. B. 571).

But if the office be honorary then an action lies without proof of special damage in the cases (1) and (2), but not in the third case. The implied damage is the risk of depri-

vation of the office of honour or credit which he holds (*Alexander v. Jenkins*, (1892) 1 Q. B. 797). Even if there is no power of removal from such office (not of profit) an action will lie for imputing misconduct to a person holding it (*Booth v. Arnold*, (1895) 1 Q. B. 571).

*Traders.*—If the plaintiff carries on any trade, an action lies for any words which relate to such trade, and “touch” or prejudice the plaintiff therein. The disparagement must be of his unfitness for business (*White v. Mellin*, (1895) A. C. 154), or some allegation which must necessarily injure his business (*Royal Baking Powder Co. v. Wright Crossley & Co.*, 15 R. P. C. 677). Any imputation on the solvency of a merchant or tradesman, any suggestion that he is or has been in pecuniary difficulties, is actionable *per se*. So is any imputation on the competency or skill of any one practising an art, *e. g.*, a watchmaker, a dentist, an architect. So if the defendant’s words impute to the plaintiff cheating, dishonesty, and fraud in the conduct of his trade.

Evidence of a general loss of business, as distinct from the loss of particular known customers, is admissible, and sufficient to maintain the action (*Ratcliffe v. Evans*, (1892) 2 Q. B. 524).

**Law.**—It is actionable to charge a barrister that “he hath as much law as a jackanapes” but not “he hath no more wit than a jackanapes.” The point being that law is, but wit is not, essential in the profession of a counsel (per Pollock, B., in *Arguendo*, 2 Ad. & E. 4). Words imputing to a barrister that he has wilfully and corruptly deceived his client, and revealed the secrets of his cause, or that he hath given vexatious counsel, and seeks only to fill his own pockets, without regard to the interests of his clients, are actionable (*Snag v. Gray*, 1 Roll. Abr. 57; *King v. Lake*, 2 Ventr. 28); or that he knows no law (*Banks v. Allen*, 1 Roll. Abr. 54) or is not fit to be a lawyer (*Peard v. Jones*, Cro. Car. 382). So are words imputing to a practising solicitor that he betrays the secrets of his clients (*Martyn v. Burlings*, Cro. Eliz. 589); or that he is acting unprofessionally (*Byrchley’s case*, 4 Rep. 16); or that he is a cheat, a rogue or a knave in his profession (*Baker v.*

*Morfe*, 1 Sid. 327); or that "he deserves to be struck off the rolls" (*Phillips v. Jansen*, 2 Esp. 624). But where the defendant spoke of a solicitor, "He has gone for thousands instead of hundreds this time;" and on another occasion said: "Have you heard anything about D. It seems to be a worse job than the other was. Miss A told me Mr. D has lost thousands. Held, that in the absence of special damage the words were not actionable as they were not reasonably capable of being construed as conveying an imputation on the plaintiff in his business as a solicitor (*Dauncey v. Holloway*, (1901) 2 K. B. 44).

**Medicine.**—Words imputing to a medical man that he is a quack or a mountebank (*Goddart v. Haselfoot*, 1 Roll. Abr. 54); or that he has killed a patient through ignorance of the first principles of his profession (*Tutty v. Alevin*, 11 Mod. 221); or that he is unskilful (*Southy v. Denny*, 1 Ex. D. 196); or negligent (*Eidsall v. Russell*, 12 L. J. C. P. 4); or that he is of bad character (*Southey v. Denny*, 17 L. J. Ex. 5; *Ayre v. Craven*, 2 Ad. & E. 2) are actionable *per se* without proof of any special damage.

**Church.**—It is actionable to accuse a beneficed clergyman of preaching false doctrine (*Dr. Sibthorpe's case*, 1 Roll. Abr. 76), or to impute to him immorality (*Evans v. Gwyn*, L. R. 5 Q. B. 844; *Gallwey v. Marshall*, 9 Ex. 294; *Highmore v. Harrington*, 3 C. B. N. S. 142), or misappropriation of the sacrament money (*Highmore v. Harrington*, *sup.*); but to charge him with fraud (*Pemberton v. Colls*, L. R. 10 Q. B. 461), or intemperance (*Cucks v. Starre*, Cro. Car. 285) is not actionable without proof of special damage, unless such charge affects him in his professional character.

**Trade.**—To say of a tradesman that he uses or sells by false weights (*Stober v. Green*, 1 Brown. & Gold. 5), or false measures (*Bray v. Ham*, *ib.* 4) or that he adulterates his goods (*Jesson v. Hayes*, 1 Roll. Abr. 63; *Ingram v. Lawson*, 6 Bing. N. C. 216); or that he is insolvent (*Robinson v. Marchant*, 15 L. J. Q. B. 136; *Brown v. Smith*, 13 C. B. 599) is actionable; for such words obviously touch him in his trade (*Griffiths v. Lewis*, L. R. 8 Q. B. 841). Where an advertisement of a dissolution of partnership was printed among a list of meetings under the Bankruptcy Act, substantial damages were allowed (*Shepherd v. Whittaker*, L. R. 10 C. P. 502).

**Other professions.**—If a clerk to a gas-light company is charged with immoral conduct with women, that imputation having no reference to his office, is not actionable, the words not being said to have been spoken of him in his office as clerk, nor proved to have occasioned him any special damage (*Lunby v. Allday*, Ball L. C. 14). But it is actionable to say that he cheats or swindles his employers (*Seaman v. Bigg*, Cro. Car. 480; *Reignald's case*, Cro. Car. 563) or that he is unfit for his place (*Rumsey v. Webb*, 11 L. J. C. P. 129). Similarly, it is actionable to impute incapacity to an

architect (*Botterill v. Whytehead*, 41 L. T. 583), a land agent or surveyor (*London v. Eastgate*, 2 Roll. R. 72), journalist, or schoolmaster (*Hume v. Marshall*, 42 J. P. 136). It is not actionable to call a stone-mason a ring-leader of the nine hours' system, since this hardly relates to his business (*Miller v. David*, L. R. 9 C. P. 118).

*Leading case.*—**Lumby v. Allday.**

4. **Unchastity.**—Formerly, words imputing unchastity to a woman were not actionable without proof of special damage (*Wilby v. Elston*, 18 L. J. C. P. 320). But the Slander of Women Act, 1891, (54 and 55 Vic. c. 51), has abolished the need of showing special damage in the case of words which impute unchastity or adultery to any woman or girl.

## 2. INDIAN LAW.

The Bombay High Court has decided that in a suit between Hindus in the Bombay mofussil damages may be recovered for mere verbal abuse, without proof of actual damage resulting therefrom to the plaintiff (*Kashiram v. Bhadu*, 7 B. H. C. A. C. J. 17).

The Calcutta High Court has, in a Full Bench case, ruled that mere use of abusive and insulting language, apart from defamation, is not actionable irrespective of any special damage (*Girish Chunder v. Jatadhari*, 26 Cal. 653 : over-ruling *Kanoo Mundle v. Rahamoollah*, (1864) W. R. Gap. No. 269; *Hossein v. Bakir Ali*, (1864) W. R. 302; *Gholam Hossein v. Hur Gobind*, 1 W. R. 19; *Tukee v. Khoshdel*, 6 W. R. 151; *Osseemooddeen v. Futteh Mahomed*, 7 W. R. 259; *Gour Chunder v. Clay*, 8 W. R. 256; *Shreenath Mookerjee v. Komul*, 16 W. R. 83; *Kali Kumar v. Ramgati*, 16 W. R. 84n.; *Srikant Roy v. Satcoori*, 3 C. L. R., 181; *Ibin Hossein v. Haidar*, 12 Cal. 109; *Trailokyanath v. Chundra Nath*, 12 Cal. 424; *Dina Ram v. Jogeswar*, 2 C. W. N. cxxiii : following *Komul Chunder v. Nobin Chunder*,

10 W. R. 184; *Phoolbasee Koer v. Parjun Singh*, 12 W. R. 369; *Chunder Nath v. Isurree Dossee*, 18 W. R. 531; *Nil Madhub v. Dookeeram*, 15 B. L. R. 161). Maclean, C. J., said: "If mere vulgar abuse, uttered in a moment of anger, abuse to which no person of ordinary sense and temper would attach the slightest importance, is, if it cause mental distress, to afford a ground of action, it is lamentable to think to what an alarming extent the flood-gates of litigation would, in this country, become open." Damages are not recoverable for mental distress *alone* caused to the plaintiff by slanderous words conveying insult (*Bhoony Money v. Natobar Biswas*, 28 Cal. 452).

The Madras High Court in the leading case of *Parvathi v. Mannar* (8 Mad. 175) has decided that the rule of English law which prohibits, except in certain cases, an action for damages for oral defamation unless special damage is alleged, being founded on no reasonable basis, should not be adopted by the Courts of British India. Turner, C. J., said: "Mere hasty expressions spoken in anger or vulgar abuse to which no hearer would attribute any set purpose to injure character would of course not be actionable, but, when a person either maliciously or with such carelessness to enquire into truth as is sometimes described as legal malice, deliberately defames another, we conceive that he ought to be held responsible for damages for the mental suffering his wrong-doing occasions....We consider the action should be allowed where the defamatory matter is such as would cause substantial pain and annoyance to the person defamed, though actual proof of damage estimable in money may not be forthcoming."

In Lower Burma it has been held that although a case may not fall within the classes for which English law permits a civil action without an allegation of special damage, the law of this country does allow a civil action to be

brought and damages to be recovered without proof of special damage, there being no logical or reasonable distinction between a libel or slander written and slander spoken (*Mi Nu v. Mi Nwe*, 5 Burma L. R. 32).

**Unchastity.**—The Calcutta High Court has recently laid down that words imputing unchastity to a woman are not actionable without proof of special damage (*Bhooni Money v. Natobar Biswas*, 28 Cal. 452).

Abusive and insulting language such as *sala* (wife's brother), *haramzada* (base born or bastard), *soor* (pig), *baper beta* (son of the father, that is, ironically, bastard) is not actionable irrespective of any special damage (*Girish Chunder v. Jatadhari*, *sup.*).

The omission of a mere courtesy cannot be taken to be equivalent to slandering or libelling a man, and is not an actionable wrong (*Sri Raja Sitarama v. Sri Raja Sanyasi*, 3 M. H. C. 4). Plaintiff sued certain persons for damages for defamation, for having in the course of a caste inquiry declared him an outcaste for committing adultery, without giving him an opportunity to vindicate his character. Held, that the defendants had not acted *bona fide* in making the declaration, and that the plaintiff was entitled to recover damages (*Vallabha v. Madusudan*, 12 Mad. 495). A railway guard, having reason to suppose that a passenger travelling by a certain train from Madras to Chingleput had purchased his ticket at an intermediate station, called upon the plaintiff and others of the passengers to produce their tickets. As a reason for demanding the production of the the plaintiff's ticket, he said to him in the presence of the other passengers "I suspect you are travelling with a wrong (or false) ticket," which was the defamation complained of. The guard was held to have spoken the above words *bona fide*. Held, that the plaintiff was not entitled to a decree for damages (*South I. Ry., v. Ramakrishna*, 13 Mad. 34).

### *Repetition of Libel and Slander.*

It is no defence to an action for libel or slander that the defendant published it by way of repetition or hearsay. "Tale-bearers are as bad as tale-makers." Every repetition of defamatory words is a new publication and a distinct cause of action. Repetition of a libel published in the first instance by another is sufficient to render the person repeating the libel liable in an action for defamation.

(*Kaikhusrū v. Jehangir*, 14 Bom. 532). A man may wrongfully and maliciously repeat that which another person may have uttered upon a justifiable occasion. As great an injury may accrue from the wrongful repetition as from the first publication of the slander; the first utterer may have been a person insane, or of bad character. The person who repeats it gives greater weight to the slander (per Littledale, J., in *M'Pherson v. Daniels*, 10 B. & C. 272).

An action will lie eventhough the statement complained of (*Waithman v. Weaver*, 11 Price 257*n*) was a current rumour and the defendant *bona fide* believed it to be true (*Watkin v. Hall*, L. R. 3 Q. B. 396). It is no defence that the speaker at the time named the person from whom he heard the scandal (*McPherson v. Daniels*, *sup.*) "Because one man does an unlawful act to any person, another is not to be permitted to do a similar act to the same person. Wrong is not to be justified, or even excused, by wrong" (per Best, C. J., in *De Crespigny v. Wellesley*, 5 Bing. 404).

If the damage arise simply from the repetition the originator will not be liable (*Parkins v. Scott*, 1 H. & C. 153; *Watkin v. Hall*, *sup.*); except—

(1). Where the originator had authorized the repetition (*Kendillon v. Maltby*, C. & M. 402); or

(2). Where an actual duty is cast upon the person to whom the slander is uttered to communicate what he has heard to some third person. As when a communication is made to a husband, such as, if true, would render the person the subject of it unfit to associate with his wife and daughters, the slanderer cannot excuse himself by saying, "True, I told the husband, but I never intended that he should carry the matter to his wife." In such case the communication is privileged; and the originator of the slander, and not the bearer of it, is responsible for the

consequences (per Cockburn, C. J., in *Derry v. Handley*, 16 L. T. N. S. 263).

If A speaks of Z words actionable only with special damage, and B repeats them, and special damage ensue from the repetition only, Z shall have an action against B, but not against A (*Parkins v. Scott*, 1 H. & C. 153). Where A slandered B in C's hearing, and C without authority repeated the slander to D, *per quod* D refused to trust B; it was held that no action lay against A, the original utterer, as the damage was the result of C's unauthorized repetition and not of the original statement (*Ward v. Weeks*, 4 M. & P. 808).

*Indian case.*—Defendant was the editor of a newspaper and had reprinted in his paper an article libelling the plaintiff, which was copied from another newspaper. The defendant endeavoured to guard himself against the consequences of this publication by commenting on the article and observing that it was evidently untrue. It, however, appeared that the defendant for years past had been writing of the plaintiff in opprobrious terms and calling him by offensive names. Held, that reading the article as a whole and in its natural sense, and taking it in connection with the previous articles appearing in the defendant's newspaper with reference to the plaintiff, it was in itself defamatory of the plaintiff (*Kaikhusr v. Jehangir*, 14 Bom. 532).

*Leading case.*—**De Crespigny v. Wellesley.**

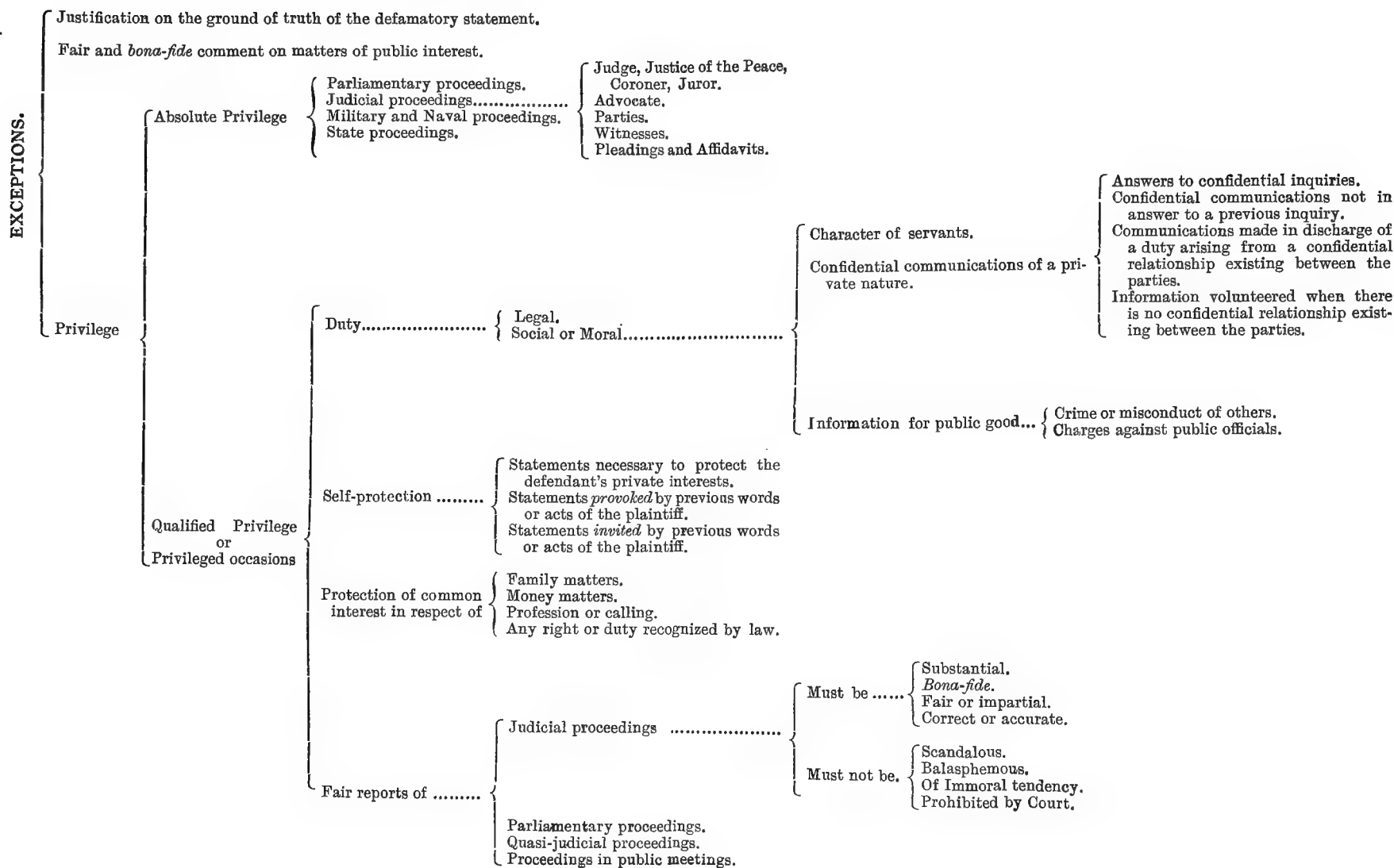
## EXCEPTIONS.

### 1. JUSTIFICATION BY TRUTH.

The truth of any defamatory words is, if pleaded, a complete defence to any action of libel or slander (*Watkin v. Hall*, L. R. 3 Q. B. 400; *Gourley v. Plimsoll*, L. R. 8 C. P. 362; *Leyman v. Latimer*, 3 Ex. D. 352), though by itself it is not a defence in a criminal trial. If the defendant succeeds in proving the truth of the libel, no action will lie in a civil Court, because the law will not permit a man to recover damages in respect to an injury to character which he either does not, or ought not to, possess (*McPherson v. Daniels*, 10 B. & C. 272—*Addison*). It would make no difference in law that the defendant had made a defamatory statement without any belief in its truth, if it turned out



# EXCEPTIONS OR DEFENCES TO AN ACTION OF LIBEL OR SLANDER.





afterwards to be true when made. If the matter is true the purpose or motive with which it was published is irrelevant. The defendant must show that the imputation made or repeated by him was true as a *whole* and in every material part thereof. But it is not necessary to justify every detail of the charge or general terms of abuse, provided that the gist of the libel is proved to be in *substance* correct, and that the details &c., which are not justified, produce no different effect on the mind of the reader than the actual truth would do (*Willmet v. Harmer*, 8 C. & P. 695). "It would be extravagant to say that in cases of libel *every* comment upon facts requires a justification. A comment may introduce independent facts, a justification of which is necessary, or it may be the shadow of the previous imputation" (per Lord Denman, *Cooper v. Lawson*, 1 W. W. & H. 601). Thus, it is enough if the statement though not perfectly accurate is *substantially* true (*Alexander v. N. Ry.*, 11 Jur. N. S. 619). Again, the defendant cannot justify one part of a statement, and admit liability for another part, without distinctly severing that which he does not (*Fleming v. Dollar*, 23 Q. B. D. 388; *Weaver v. Lloyd*, 4 D. & R. 230; *Ingram v. Lawson*, 1 Arn. 387).

If there is gross exaggeration the plea of justification will fail (*Clarkson v. Lawson*, 6 Bing. 266).

The maxim, "the greater the truth, the greater the libel," is no longer applicable to any but criminal cases, in which the truth is only a justification provided that it is also shown that the publication was for the *public good*. The criminal law views the matter from the stand-point of the king's peace, of a breach of which the libel is frequently all the more likely to be provocative in proportion to its truth (*Innes*). According to the Indian Penal Code it is not enough that the words complained of are true, the defendant must then be prepared to go further and prove

that not only are the words true, but that also it is for the *public benefit* that they should be published.

In cases of defamation onus of proving the truth of the statement or at least of showing that he had reasonable ground for believing it to be true, and was actuated in making such statement not by malicious motives, but by an intelligent zeal for the public interest lies on the person making the statement (*Altaf Hossien v. Tasudook Hossien*, 2 Agra 87).

**Justification.**—Where the libel complained of was that “L, B and G are a gang who live by card-sharping;” it was held to be sufficient justification to prove that upon two distinct occasions L, B and G had cheated at cards (*R. v. Labouchere*, 14 Cox C. C. 449).

**No justification.**—Where a newspaper published a paragraph by the title “How Lawyer B treats his Clients” and this contained a report of a case in which one client of lawyer B had been badly treated; it was held that the title was not justified by the facts, and that the plaintiff was entitled to damages (*Bishop v. Latimer*, 4 L. T. 775). Where a newspaper had published a correct report of certain proceedings in the Insolvent Debtors’ Court preceded by the title “Shameful conduct of an Attorney,” the report was held privileged, but damages were recovered for the title (*Clement v. Lewis*, 3 B. & B. 297). Where the libel stated that the plaintiff, a proctor, had been *three* times suspended for extortion; it was held to be no justification to prove that he had been *once* so suspended (*Clarkson v. Larsson*, 6 Bing. 266). Where the defendant had stated that the plaintiff was a “libellous journalist” it was held that a plea of justification was not supported by proof that the plaintiff had libelled one person who had obtained damages (*Wakeley v. Cooke*, 4 Ex. 511). Where the editor of a newspaper was called “a felon editor” as he was once convicted; it was held that this was no justification, inasmuch as a person who has been convicted and suffered his term of imprisonment does not, in law, continue to be a felon (*Leyman v. Latimer*, 3 Ex. D. 15, 352).

## 2. FAIR AND BONA FIDE COMMENT.

Fair and *bona fide* comment on matters of public interest are not libellous, however severe in their terms, unless they are written intemperately and maliciously (*Odgers*). Every subject has a right to comment on those acts of public men which concern him as a subject of the realm, if he

does not make his commentary a cloak for malice and slander. A writer in a public paper has the same right as any other person, and it is his privilege, if indeed it is not his duty, to comment on the acts of public men which concern not himself only, but which concern the public, and the discussion of which is for public good. Where a person makes the public conduct of a public man the subject of comment, and it is for the public good, he is not liable to an action if the comments are made honestly, and he honestly believes the facts to be as he states them, and there is no misapprehension of fact or any misstatement which he must have known to be a misstatement if he had exercised ordinary care (*Howard v. Mull*, per Couch, J., in 1 B. H. C. AP. 91).

Matters of public interest are :—

(1). Affairs of State (*Parmiter v. Coupland*, 6 M. & W. 108; *Seymour v. Butterworth*, 3 F. & F. 376; *R. v. Carden*, 5 Q. B. D. 1).

(2). The administration of Justice (*Daw v. Eley*, L. R. 7 Eq. 49; *Lewis v. Levy*, E. B. & E. 537; *R. v. O'Dogherty* 5 Cox C. C. 348; *Woodgate v. Ridout*, 4 F. & F. 223; *R. v Tanfield*, 42 J. P. 424).

(3). Public institutions and local authorities (*Purcell v. Sowler*, 2 C. P. D. 218; *Cox v. Feeney*, 4 F. & F. 13).

(4). Ecclesiastical matters (*Kelly v. Tinling*, L. R. 1 Q. B. 699).

(5). Books, pictures and works of art (*Strauss v. Francis*, 4 F. & F. 1114; *Fraser v. Berkeley*, 7 C. & P. 621; *Thompson v. Shackell*, M. & M. 187).

(6). Theatres, concerts, and other public entertainments (*Green v. Chapman*, 4 Bing. N. C. 92; *Dibden v. Swan*, 1 Esp. 27; *Gregory v. Brunswick*, C. & K. 24).

(7). Other appeals to the public, *e. g.*, (a) a medical man bringing forward some new method of treatment and

advertising it (*Morison v. Hurmer*, 3 Bing. N. C. 759; (b) a tradesman distributing hand-bills (*Paris v. Levy*, 9 C. B. N. S. 342); (c) a man appealing to the public by writing letters to a newspaper (*Odger v. Mortimer*, 28 L. T. 472; *O'Donoghue v. Hussey*, Ir. R. 5 C. L. 124); (d) a man coming prominently forward in any way, and acquiring for a time a *quasi*-public position (*Davis v. Duncan*, L. R. 9 C. P. 396) (*Odgers*).

Nothing is more important than that fair and full latitude or discussion should be allowed to writers upon any public matter, whether it be the conduct of public men, or the proceedings in Courts of Justice, or in Parliament, or the publication of a scheme, or a literary work (per Crompton, J., in *Campbell v. Spottiswoode*, 3 B. & S. 778). The comment must be *bona fide* and must not be made a cloak for malice. There should be no insinuation of base and wicked motives, or of improper and dishonourable conduct, without some foundation in fact; and it is no defence that defendant honestly believed the charges to be true (per Cockburn, C. J., in *ibid.*). The critic is at liberty to comment upon and ridicule the sentiments and opinions of the author, but he is not justified in making calumnious remarks on the private character of the individual (per Lord Ellenborough, in *Stuart v. Lovell*, 2 Stark. 97; *Carr v. Hood*, 1 Camp. 355).

Where a question of libel is brought in respect of a comment on a matter of public interest the Court has to decide whether the disparaging statements go beyond the limits of fair criticism...It is very easy to say what would be clearly beyond that limit, if, for instance, the writer attacked the private character of the author. But it is much more difficult to say what is within the limit. That must depend upon the circumstances of the particular case. Mere exaggeration, or even gross exaggeration, would not

make the comment unfair. However wrong the opinion expressed may be in point of truth, or however prejudiced the writer, it may still be within the prescribed limit. The question which should be considered is—Would any fair man, however prejudiced he may be, however exaggerated or obstinate his views, have said that which this criticism has said? (per Lord Esher, M. R., in *Merivale v. Carson*, 20 Q. B. D. 280, which overruled the case of *Henwood v. Harrison*, L. R. 7 C. P. 66, and followed *Campbell v. Spottiswoode*, 3 B. & S. 769). “It must be assumed that a man is entitled to entertain any opinion he pleases, however wrong, exaggerated, or violent it may be, and it must be left to the jury to say whether the mode of expression exceeds the reasonable limits of fair criticism...The writer would be travelling out of the region of fair criticism...if he imputes to the author that he has written something which in fact he has not written” (per Bowen, L. J. *ibid.*, 283; *Carr v. Hood*, 1 Camp. 355, *Tabart v. Tipper*, 1 Camp. 351).

It should be considered what impression would be produced in the mind of an unprejudiced reader who reads the article complained of straight through, knowing nothing about the case beforehand. The article must be considered as a whole, too much attention must not be paid to isolated passages. If there are such deviations from absolute accuracy as to make the comment unfair, the plaintiff must win; but, if there are no such deviations, or the deviation is minute and within the latitude of fair discussion, and within the region of that diversity of opinion which may be fairly and reasonably entertained by different persons upon the same subject matter, he must fail (*South Hetton Coal Co. v. N. E. News Asso.* (1894) 1 Q. B. 143).

Thus, legitimate criticism is no tort; should loss ensue

to the plaintiff, it would be *damnum sine injuria* (*Merivale v. Carson*, 20 Q. B. D. 275). But

(1) the words published must be fairly relevant to some matter of public interest ;

(2) they must be the expression of an opinion, and not the allegation of a fact ;

(3) they must not exceed the limits of a fair comment ; and

(4) they must not be published maliciously. The word "fair" in the phrase "a fair comment" refers to the language employed, and not to the mind of the writer. Hence, it is possible that a fair comment should yet be published maliciously.

A person has a right to comment upon the public acts of a minister, or of an officer of State, or upon the Members of both Houses of Parliament (*Wason v. Walter*, L. R. 4 Q. B. 93), or upon the public acts of a General, or upon the public judgments of a Judge (*Davis v. Duncan*, L. R. 9 C. P. 396), or upon the conduct of persons at a public election meeting, or upon the sermons of a clergyman, or upon his conduct in respect to his church, or conduct of public worship (*Kelly v. Tinling*, L. R. 1 Q. B. 699), or upon the public skill of an actor ; but he has no right to impute to them such conduct as disgrace and dishonours them in private life (*Parmiter v. Coupland*, 6 M. & W. 108 ; *Gattercole v. Mial*, 15 M. & W. 319). A fair criticism of the past exploits of one who is endeavouring to push a scheme of national importance is not actionable (*Henwood v. Harrison*, L. R. 7 C. P. 606).

### 3. PRIVILEGE.

The meaning of the word 'privilege' when used to indicate protection to a defamatory communication is, that a person stands in such a relation to the facts of the case that he is justified in saying or writing what would be slanderous or libellous in any one else (*Folkard*). There are occasions on which it is right that one man should speak about another, and state fully and freely what he honestly believes to be the truth as to his character or means. Such occasions are deemed in law to be *privileged*;



and it is a defence to an action of libel or slander that the words were published on a privileged occasion.

Privileged occasions are of two kinds :—(1) those absolutely privileged; and (2) those in which the privilege is but qualified.

(1). On certain occasions the interests of society require that a man should speak out his mind fully and frankly, without thought or fear of consequences. To such occasions, therefore, the law attaches an **absolute privilege**; and any action in respect of words so published is forbidden, even though it be alleged that they were spoken falsely, knowingly, and with express malice. This absolute privilege is confined to cases in which the public service or the administration of justice requires that complete immunity should be afforded, *e. g.*, words spoken in Parliament or in the course of judicial, military, or naval proceedings, &c.

(2). In less important matters the interests of the public do not demand that the speaker should be freed from *all* responsibility, but merely require that he should be protected so far as he is speaking honestly for the common good; in these cases the privilege is said to be **qualified** only; and the plaintiff will recover damages in spite of the privilege, if he can prove that the words were not used *bona fide* but that the defendant availed himself of the privileged occasion wilfully and knowingly to defame the plaintiff (*Odgers*). Thus, **qualified privilege** is a privilege rebuttable by proof of express malice or malice in fact.

The distinctions between **absolute** and **qualified** privileges are.—

(1). In the case of *absolute privilege*, it is the occasion which is privileged, and when once the nature of the occasion is shown, it follows, as a necessary inference, that every communication on that occasion is protected. But

in the case of *qualified privilege* the defendant does not prove privilege until he has shown how that occasion was used. A communication on a privileged occasion, therefore, is not necessarily a privileged communication, though the terms are frequently used as convertible. It is not enough to have an interest or duty in making a communication, the interest or duty must be shown to exist in making *the* communication complained of (per Dowse, B., in *Lynam v. Gowing*, L. R. 6 Ir. 269). In respect of qualified privilege, it is only protected where the occasion is lawful, and is limited by the necessities of the case (*Keshavlal v. Girja*, 1 Bom. L. R. 484; 24 Bom. 13).

(2). Even after a case of *qualified privilege* has been established, it may be met by the plaintiff proving in reply actual malice on the part of the defendant, for he thus shows that the plea is only colourable, and that under the pretence of doing his duty or protecting his lawful interest the defendant has been pursuing some by-end or gratifying his ill-will (*C. & L.*, 502). It is for the plaintiff to prove that the defendant acted in bad faith, not for the defendant to prove that he acted in good faith (*Clark v. Molyneux*, 3 Q. B. D. 237; *Jenoure v. Delmege*, (1891) A. C. 73). The cases of absolute privilege are protected in all circumstances, independently of the presence of good or bad faith (*Keshavlal v. Girja*, *sup.* 483).

### I. *Absolute privilege.*

Occasions absolutely privileged may be grouped under four heads:—(1) Parliamentary proceedings; (2) Judicial proceedings; (3) Military and Naval proceedings; (4) State proceedings.

#### I. PARLIAMENTARY PROCEEDINGS.

Speeches in Parliament are absolutely and irrebuttably privileged (*Stockdale v. Hansard*, 9 A. & E. 1; *Dillon v.*

*Balfour*, 20 Ir. L. R. 601). A member is not in any way responsible for anything said in the House, but this privilege does not extend to anything said outside the walls of the House, or to a speech printed and privately circulated outside the House (*R. v. Abingdon*, 1 Esp. 226). For such a speech only a *qualified privilege* can be claimed (*Davison v. Duncan*, 7 E. & B. 233). A petition to Parliament is absolutely privileged, although it contains certain false and defamatory statements (*Lake v. King*, 1 Saund. 181); so is a petition to a committee of either House (*Kane v. Mulvany*, Ir. R. 2 C. L. 402). But a publication of such a petition to others not members of the House is not privileged. Statements of witnesses before Parliamentary select committees of either House are also privileged (*Goffin v. Donnelly*, 6 Q. B. D. 307). No indictment will lie for an alleged conspiracy by members of either House to make speeches defamatory of the plaintiff (*Ex parte Wason*, L. R. 4 Q. B. 573).

At Common law, even if the whole House ordered the publication of Parliamentary reports and papers, no privilege attached (*R. v. Williams*, 2 Shower 47; *Stockdale v. Hansard*, 2 M. & R. 9). But now by a Statute all reports, papers, votes and proceedings ordered to be published by either House of Parliament are made absolutely privileged (3 & 4 Vic. c. 9).

## 2. JUDICIAL PROCEEDINGS.

No action will lie for defamatory statements made or sworn in the course of a judicial proceeding before any Court of competent jurisdiction. Every thing that a Judge says on the bench, or a witness in the box, or a counsel in arguing, is absolutely privileged, so long as it is in any way connected with the inquiry. So are all documents necessary to the conduct of the case, such as pleadings,

affidavits, and instructions to counsel. This immunity rests on obvious grounds of public policy and convenience (*Odgers*).

**Judge.**—A Judge of a superior Court, *i.e.*, of the House of Lords, the Judicial Committee of the Privy Council, the Court of Appeal, the High Court of Justice, and Courts of Nisi Prius and Assize, has an absolute immunity, and no action can be maintained against him, even though it be alleged that he spoke maliciously, knowing his words to be false, and also that his words were irrelevant to the matter in issue before him, and wholly unwarranted by evidence. It is essential to the highest interests of public policy to secure the free and fearless discharge of high judicial functions (*Floyd v. Barker*, 12 R. 24; *Taaffe v. Downes*, 3 M. P. C. 36; *Fray v. Blackburn*, 3 B. & S. 576). No action lies even though such Judge has acted oppressively and maliciously, to the prejudice of the plaintiff and to the perversion of justice (*Anderson v. Gorrie*, (1895) 1 Q. B. 668).

A Judge of an inferior Court of record enjoys the same immunity in this respect as the Judge of a Superior Court, so long as he has *jurisdiction* over the matter before him (*Scott v. Stansfield*, L. R. 3 Ex. 220). For any act done in any proceeding in which he either knows, or ought to know, that he is *without jurisdiction*, he is liable as an ordinary subject (*Houlden v. Smith*, 14 Q. B. D. 841; *Calder v. Halket*, 3 M. P. C. 28). And so he would be liable for words spoken after the business of the Court is over (*Paris v. Levy*, 9 C. B. N. S. 342).

**Indian law.**—An action for defamation cannot be maintained against a Judge for words used by him whilst trying a cause in Court even though such words are alleged to be false, malicious and without reasonable cause (*Raman Nayar v. Subramanya*, 17 Mad. 87).

**Justice of the Peace.**—A Justice of the Peace enjoys an equal immunity. No action will lie against him unless the defamatory words are wholly unconnected with the matter in issue and are spoken maliciously and without reasonable or probable cause (*Kirby v. Simpson*, 10 Ex. D. 358; *Gelen v. Hall*, 2 H. & N. 379). But if the conduct of the plaintiff be a matter in any way relevant to the enquiry, and the proceedings are within the *jurisdiction* of the Magistrate, he may express his opinion of such conduct with the utmost freedom and no action will lie (*Munster v. Lamb*, 11 Q. B. D. 588).

**Coroner.**—No action lies against a coroner for anything he says in his address to the jury impanelled before him, however defamatory, false, or malicious it may be; unless the plaintiff can prove that the statement was wholly *irrelevant* to the inquisition and not warranted by the occasion; the coroner's Court being "a Court of record of very high authority" (*Thomas v. Churton*, 2 B. & S. 475; *Yates v. Lansing*, 5 Johns. 283).

**Juror.**—Every observation of a juror is absolutely privileged if connected with the matter in issue (*R. v. Skinner*, Lofft. 55); so is any presentment by a Grand Jury (*Little v. Pomeroy*, Ir. R. 7 C. L. 50).

**Advocate.**—The freedom of speech at the Bar is the privilege of the client, vested in the counsel, who represents him. No action will lie against an advocate for defamatory words spoken with reference to, and in the course of, any inquiry before a judicial tribunal, although they are uttered by the advocate maliciously, and not with the object of supporting the case of his client, and are uttered without any justification, or even excuse, and from personal ill-will or anger towards the person defamed, arising out of a previously existing cause, and are irrelevant to every issue of fact which is contested before the tribunal (*Munster v.*

*Lamb*, 11 Q. B. D. 588). Brett, M. R., said : " A counsel's position is one of the utmost difficulty. He is not to speak of that which he knows ; he is not called upon to consider whether the facts with which he is dealing are true or false. What he has to do is to argue as best he can without degrading himself in order to maintain the proposition which will carry with it either the protection or the remedy which he desires for his client. If amidst the difficulties of his position he were to be called upon during the heat of an argument to consider whether what he says is true or false, whether what he says is relevant or irrelevant, he would have his mind so embarrassed that he could not do the duty which he is called upon to perform...To my mind it is illogical to argue that the protection of privilege ought not to exist for a counsel, who deliberately and maliciously slanders another person. The reason of the rule is that a counsel who is not malicious and who is acting *bona fide* may not be in danger of having actions brought against him. If the rule of the law were otherwise, the most innocent of counsel might be unrighteously harrassed with suits, and therefore it is better to make the rule of law so large that an innocent counsel shall never be troubled, although by making it so large, counsels are included who have been guilty of malice and misconduct" (*Ib.*, 588). His words are absolutely privileged, although he may have exceeded his instructions (*Needham v. Dowling*, 15 L. J. C. P. 9 ; *Armstrong v. Kierman*, 5 Ir. C. L. R. 171 ; *Taylor v. Swinton*, 2 Shaw's Sc. Ap. Ca. 245).

*Indian law.*—An advocate in this country cannot be proceeded against either civilly or criminally for words uttered in his office as advocate (*Sullivan v. Norton*, 10 Mad. 28, F. B.). An advocate has the fullest liberty of speech in the course of a trial before a judicial tribunal so long as his language is justified by his instructions, or by the evi-

dence, or by the proceedings on the record. The mere fact that his words are defamatory, or that they are calculated to hurt the feelings of another, or that they ultimately turn out to be absolutely devoid of all solid foundation, would not make him responsible nor render him liable in any civil or criminal proceeding (*Bhaishankar v. Wadia*, 2 Bom. L. R. 3, F. B.).

**Solicitors** acting as advocates have a like privilege (*Mackay v. Ford*, 5 H. & N. 792).

**Party.**—Defamatory statements by a party in open Court conducting his own cause are also absolutely privileged; and no action will lie, no matter how false or malicious or irrelevant to the matter in issue the words complained of may have been (*Royal Aquirium &c. v. Parkinson*, (1892) 1 Q. B. 451). “The party himself, from his comparative ignorance of what is and what is not relevant, may be indulged in a greater latitude and not be restricted within the same limits as a counsel whose superior knowledge must be sufficient to restrain him within due bounds” (per Holroyd, J., in *Hodgson v. Scarlett*, 1 B. & Ald. 244).

**Witness.**—A witness in the box is absolutely privileged in answering all the questions asked him by the counsel on either side; and even if he volunteers an observation still if it has *reference to the matter in issue*, or fairly arises out of any question asked him by counsel, though only going to his credit, such observation will also be privileged (*Seaman v. Netherclift*, 1 C. P. D. 540). But a remark made by a witness in the box, wholly *irrelevant* to the matter of inquiry, uncalled for by any question of counsel, and introduced by the witness maliciously for his own purposes, would not be privileged. So, of course an observation made by a witness while waiting about the Court, and before entering or after leaving the box, is not

privileged (*Trotman v. Dunn*, 4 Camp. 211; *Lynam v. Gowing*, 6 L. R. Ir. 259).

*Indian law.*—The Privy Council has decided that witnesses cannot be sued in a civil Court for damages, in respect of evidence given by them upon oath in a judicial proceeding. The ground of this principle is this, “that it concerns the public and the administration of justice that witnesses giving their evidence on oath in a Court of Justice should not have before their eyes the fear of being harassed by suits for damages; but that the only penalty which they should incur if they give evidence falsely should be an indictment for perjury” (*Baboo Gunnesh Dutt Singh v. Magneeram*, 11 B. L. R. 321; 5 W. R. 134; *Chidambara v. Thirumani*, 10 Mad. 87; *Nathji v. Lalbhai*, 14 Bom. 97). Similarly, the Bombay High Court has held that no action lies against a witness in respect of words spoken by him in the witness-box although they are false (*Templeton v. Laurie*, 2 Bom. L. R. 244; 25 Bom. 230). The Calcutta and Allahabad High Courts and the Chief Court of Punjab further lay down that statements made by witnesses are protected only if they are relevant to the inquiry (*Bhikumber Singh v. Becharam*, 15 Cal. 264; *Dawan Singh v. Mahip Singh*, 10 All. 425; *Tulshi Ram v. Harbans*, 5 A. W. N. 301; *Mohun Lall v. Levinge*, P. R. 39 of 1868; *Ali Khan v. Malik Yaran Khan*, P. R. 16 of 1879; *Kundan v. Ramji Das*, P. R. 146 of 1879). No action lies also against a person for what he states in answer to questions put to him by a Police Officer conducting an investigation under the provisions of the Criminal Procedure Code (*Methuram v. Jaggannath*, 28 Cal. 794).

*Affidavits, Pleadings, &c.*—Every affidavit sworn in the course of a judicial proceeding before a Court of *competent* jurisdiction is absolutely privileged, and no action lies therefor, however false and malicious may be the state-



ments made therein (*Revis v. Smith*, 18 C. B. 126). The only exception is where an affidavit is sworn recklessly and maliciously before a Court that has *no* jurisdiction in the matter, and no power to entertain the proceeding (*Buckley v. Wood*, 4 R. 14; *R. v. Salisbury*, 1 Ld. Raym. 341—*Odgers*). The plaintiff's remedy is to indict the deponent for perjury. The Court will, however, sometimes order scandalous matter in such an affidavit to be expunged (*Christie v. Christie*, L. R. 8 Ch. 499).

No action for libel lies for any statement in the pleadings (*Seaman v. Netherclift*, L. R. 1 C. P. 545; see *MacCabe v. Joynt*, (1901) 2 I. R. 115).

*Indian law.*—The Bombay High Court has decided that no action for libel lies for any statement in pleadings (*Nathji v. Lalbhai*, 14 Bom. 97).

The Calcutta High Court has laid down that a defamatory statement made in the pleadings in an action is not absolutely privileged (*Angada Ram v. Nemai Chand*, 23 Cal. 867).

The Madras High Court (though it has never decided the question judicially) has said in *Hinde v. Baudry* (2 Mad. 13): "If they (defendants) were rightfully making an application in the suit, the principle of public policy which guards the statement of a party or witness against an action would prevent them whether the statement was malicious or not."

The Allahabad High Court has held that defamatory statements are not privileged merely because they are used in a petition preferred in a judicial proceeding. The law of defamation which should be applied in suits in India for defamation is that laid down in the Indian Penal Code and not the English law of libel and slander (*Abdul Hakim v. Tej Chandar*, 3 All. 815; *Chowdhry Goordutt v. Gopal Dass*, 1 Agra 33). If they are not relevant to the suit they can-

not be held to be privileged (*Gobindhi v. Jodha*, 5 A. W. N. 204).

The plaintiff claimed to recover damages from the defendants for publishing defamatory matter in an application they had filed in a suit brought against them by one M, in which the plaintiff was described by the defendants as a person "whose occupation it was to obtain his living by getting up such fraudulent actions," and that he was induced to make a false claim by the plaintiff. The application appeared to have been made with the object of having other persons made parties to that suit. Held, that the defendants were privileged against a civil action for damages for what they might have said of the plaintiff in an application they had presented in that suit (*Nathji v. Lalbhai*, *sup.*). Where the defendant made defamatory statements about the plaintiff, a Munsiff, in a petition which he presented to the District Judge to transfer his case from the Court of the plaintiff, it was held that the communication was not privileged (*Shibnath v. Satkauri*, 3 W. R. 198). Where defendant presented a petition to a Magistrate by way of defence to a charge of criminal trespass brought against him by plaintiff and containing statements to the effect that the plaintiff had caused the criminal proceedings to be instituted against him in order to extort money, it was held that defamatory statements were not privileged merely because they were used in a petition preferred in a judicial proceeding (*Abdul Hakim v. Tej Chandar*, *sup.*).

### 3. MILITARY AND NAVAL PROCEEDINGS.

Proceedings of naval and military officers are absolutely privileged. All acts done in the honest exercise of military authority are privileged. Any untrue or malicious defamatory statement made before a naval or military Court martial is protected (*Dawkins v. Lord Rokeby*, L. R. 7 H. L. 744). Reports made in the course of military or naval duty are also absolutely privileged; and no action lies in respect of untrue and malicious statements written in such reports (*Dawkins v. Lord Paulet*, L. R. 5 Q. B. 94). A military man giving evidence before a Military Court of Inquiry, which has not the power to administer an oath, is entitled to the same protection as that enjoyed by a witness under examination in a Court of Justice (*Dawkins v. Lord Rokeby*, *sup.*).

#### 4. STATE PROCEEDINGS.

For reasons of public policy absolute protection would be given to every communication relating to State matters made by one minister to another, or to the Crown (*Chatterton v. Secretary of State for India*, (1895) 2 Q. B. 191, 194). All communications between ministers of State, with regard to public matters or public functions, all expressions of opinion in the conduct of public duties by the officers of State, and all records and documents in which the opinions, or orders of public officers relating to other public officers are contained, are absolutely privileged, and cannot be compelled to be produced in a Court of law. If *prima facie* a document purports to be an official communication which would be privileged, no allegation of malice would be allowed and no proof of malice would take away the privilege (*Jehangir Manekji v. Secretary of State*, 5 Bom. L. R. 30).

A communication made by Secretary of State for India in Council to the Parliamentary Under-Secretary to enable the latter to answer a question asked in the House of Commons with regard to the treatment of an officer in the army, by the Indian military authorities, is absolutely privileged, being made by an officer of State to his subordinate in the course of his official duty. Held, that an action for defamation founded on such a statement could not possibly be maintainable, and should, therefore, be dismissed as vexatious (*Chatterton v. Secretary of State*, *sup.*).

## II. *Qualified privilege.*

The proper meaning of a privileged communication is only this : that the occasion on which the communication was made rebuts the inference *prima facie* arising from a statement prejudicial to the character of the plaintiff, and puts it upon him to prove that there was malice in fact—that the defendant was actuated by motives of personal spite or ill-will, independent of the occasion on which the

communication was made (per Park, B., in *Wright v. Woodgate*, 2 C. M. & R. 577; per Lindley, J., in *Stuart v. Bell*, (1891) 2 Q. B. 345).

The plaintiff must prove 'malice in fact' which is not confined to personal spite and ill-will, but includes every unjustifiable intention to inflict injury on the person defamed, or every wrong feeling in a man's mind (*Stuart v. Bell*, (1891) 2 Q. B. 351). He must show that the defendant was acting from some other motive than a sense of duty (*Clarke v. Molyneux*, 3 Q. B. D. 237; *Jenoure v. Delmege*, (1891) A. C. 73).

Thus, "the occasion must be made use of *bona fide* and without malice. The defendant is only entitled to the protection of the privilege if he uses the occasion in accordance with the purpose for which the occasion arose. He is not entitled to the protection of the privilege if he uses the occasion for some indirect or wrong motives. This casts upon the plaintiff the burden of proving express malice or malice in fact. If it be proved that out of anger or for some other wrong motive the defendant has stated as true that which he does not know to be true, and he has stated it not stopping or taking the trouble to ascertain whether it is true or not—stated it recklessly by reason of his anger or other indirect motive—the jury may infer that he used the occasion not for the reason that justifies it, but for the gratification of his anger or other indirect motive" (per Lopes, L. J., in *Royal Aquarium &c. v. Parkinson*, (1892) 1 Q. B. 454). Malice may be proved by showing that the defendant knew the words were untrue when he wrote or spoke them (*Gerard v. Dickenson*, 4 Rep. 18; *Smith v. Hodgeskins*, Cro. Car. 276), or that they were uttered with the intention of injuring the plaintiff (*Peacock v. Reynal*, 2 B. & G. 151), or that the plaintiff and defendant were rivals or had previously quarrelled (*Hooper v.*

*Truscott*, 2 Bing. N. C. 457), or that the defendant was actuated by personal resentment (*Gilpin v. Fowler*, 9 Ex. 615; *Dickson v. Earl of Wilton*, 1 F. & F. 419), or any other wrong motive (*Rogers v. Clifton*, 3 B. & P. 587; *Jackson v. Hopperton*, 16 C. B. N. S. 829). It may be proved by the unnecessarily extensive publication of the words (*Gilpin v. Fowler*, 9 Ex. 615) or by the violent language used (*Spill v. Maule*, L. R. 4 Ex. 235; see *Nevill v. Fine Arts and Gen. Ins. Co.*, (1895) 2 Q. B. 170).

The following are the cases of *qualified privilege* in which proof of malice enables the plaintiff to succeed:—

1. When circumstances are such as to cast on the defendant the duty of making the communication to a third party (per Lopes, L. J., in *Pullman v. Hill*, (1891) 1 Q. B. 530; *Dawkins v. Lord Paulet*, L. R. 5 Q. B. 94).

2. Communications made in self-defence.

3. When the defendant has an interest in making the communication to the third person, and the third person has a corresponding interest in receiving it (per Lopes, L. J., in *Pullman v. Hill*, *sup.*, 630; *Hunt v. G. N. Ry.*, (1891) 2 Q. B. 191).

4. Communications made to persons in public position for public good.

5. Fair and impartial reports of proceedings—

(a) in Parliament; or

(b) in any Court of justice; or

(c) in any public meeting, or meeting of certain public bodies, and persons specified in s. 4 of the Law of Libel Amendment Act, 1888.

# I. DUTY.

A communication, injurious to the character of another, made *bona fide* from a sense of duty, legal, moral, or social, and reasonably necessary for the due discharge of such

duty, and made with a belief in its truth is privileged, but such privilege will be rebutted if plaintiff prove that defendant made such statement maliciously (*Dawkins v. Lord Paulet*, L. R. 5 Q. B. 102; *Jenouire v. Delmege*, (1891) A. C. 73; *Stuart v. Bell*, (1891) 2 Q. B. 341; *Bray v. Ford*, (1896) A. C. 44, 46). But a libel is not privileged because the person making the same honestly and reasonably believed that the person to whom it was made had an interest or duty in the matter, if as a fact that person has not such interest or duty (*Hebditch v. MacIlwaine*, (1894) 2 Q. B. 54).

### 1. *Legal duty.*

One public officer may address to another a statement of facts pertinent to a matter which it is his duty to investigate, and which he believes to be true. But if he introduces irrelevant calumny and strictures upon the motives and conduct of others which the facts stated do not warrant, he will exceed his privilege (*Cooke v. Wilde*, 5 E. & B. 328). Statements made by one official regarding the conduct of another official to the superior authority are privileged if made honestly in belief of their truth, and it is for the plaintiff to prove that they were not so made (*Hart v. Gampech*, L. R. 4 P. C. 458—*Collett*).

Assuming that making a defamatory statement in a letter written in reply to a communication from an official superior and admitting in the letter that a similar statement has been made to another person amounts to a publication, still such a letter is confidential and is privileged (*Thomas v. Simmonds*, 4 Burma L. R. 152).

### 2. *Social or Moral duty.*

Communications made in pursuance of a duty owed to society relate to

- (1). Character of servants.
- (2). Other confidential communications of a private nature.

(3). Information as to crime or misconduct of others :  
Charges against Public officials.

(1). *Character of servants.*

The instance that occurs frequently of this class is where the defendant is asked as to the character of his former servant, by one to whom he or she has applied for a situation. A duty is thereby cast upon the former master to state fully and honestly all that he knows either for or against the servant ; and any communication, made in the performance of this duty, is clearly privileged for the sake of the common convenience of society, even though it should turn out that the former master was mistaken in some of his statements (*Toogood v. Spyring*, 1 C. M. & R. 193). But if the master, knowing that the servant deserves a good character, yet, having some grudge against him, or from some other malicious motive, deliberately states what he knows to be false, and gives his late servant a bad character, then such a communication is not a performance of the duty, and therefore is not privileged. There is, in fact, in such a case, evidence of malice which "takes the case out of the privilege."

No one is bound to give a character to his servant when asked for it (*Carrol v. Bird*, 3 Esp. 201); and if any character is given, it must be one fully warranted by the facts, and not prompted by unworthy motives.

If, after a favourable character has been given, facts come to the knowledge of the former master which lead him to alter his opinion, it is his duty to inform the person to whom he gave the character of his altered opinion. (*Gardner v. Slade*, L. R. 13 Q. B. 796 ; *Child v. Affleck*, 4 M. & R. 338, *Fowles v. Bowen*, 30 N. Y. R. 20—*Odgers*).

When a master thinks another is going to engage his servant whom he believes to be an improper person, he

may take steps to communicate the facts. But when he *volunteers* to give the character, stronger evidence of good faith and absence of malice will be required than where he gave it upon inquiry (*Pattison v. Jones*, 8 B. & C. 578).

Where A took a servant with a good character given to her by B, and was sorely disappointed in her, A was held entitled to write and inform B that she did not deserve the character he gave her, so that B might refrain from recommending her to others; and such a letter was privileged (*Dixon v. Parson* 1 F. & F. 24). Where A had dismissed B and given him a bad character; and then C, B's brother-in-law repeatedly asked A what he had said, and A wrote his reasons to C, and then B sued the latter, it was held to be privileged as having been invited (*Weatherston v. Hawkins*, 1 T. R. 110). Where the plaintiff proved that he had been in the service of the defendant, and had been dismissed on a charge of theft, and that he afterwards came to the defendant's house, and had some communication with the defendant's servants when the defendant said to them "I have dismissed that man for robbing me, do not speak to him any more in public or in private, or I shall think you as bad as him;" it was held, that the statement being honestly made by a master as a warning to his servants was a privileged communication, and that it was incumbent on the plaintiff to give some evidence of malice (*Somerville v. Hawkins*, 10 C. B. 590).

(2). *Confidential communications of a private nature.*

These are—

(a) Answers to confidential inquiries.

(b) Confidential communications not in answer to a previous inquiry.

(c) Communications made in discharge of a duty arising from a confidential relationship existing between the parties.

(d) Information volunteered when there is no confidential relationship existing between the parties.

(a) *Answers to confidential inquiries.*—If a person who is thinking of dealing with another in any matter of business asks a question about his character from some one who has means of knowledge, it is for the interests of society that the question should be answered; and if



answered *bona fide* and without malice, the answer is a privileged communication (per Brett, L. J., in *Waller v. Loch*, 7 Q. B. D. 622). Every one owes it as a duty to his fellow-men to state what he knows about a person when inquiry is made, and every thing pertinent to the subject of the inquiry which subsequently passes between the parties is also privileged (*Beatson v. Skene*, 29 L. J. Ex. 430).

(b) **Confidential communications not in answer to a previous inquiry.**—"It is not necessary in all cases that the information should be given in answer to an inquiry" (per Jessel, M. R., in *Waller v. Loch*, 7 Q. B. D. 621). Many occasions are privileged in which no application is made to the defendant, but he himself takes the initiative; while, on the other hand, many answers to inquiries will not necessarily be privileged, even if given confidentially. The question in every case is this—Were the circumstances such that an honest man might reasonably suppose it his duty to act as the defendant has done in this case? And the circumstances may be such that it is clearly the duty of a good citizen to go at once to the person most concerned and tell him everything, without waiting for him to come and inquire (*Odgers*).

(c) **Communications made in case of confidential relationship.**—This can be done in cases where there exists between the parties such a confidential relation as to throw on the defendant the duty of protecting the interests of the person concerned. Such a confidential relationship exists between husband and wife, father and son, brother and sister, guardian and ward, master and servant, principal and agent, solicitor and client, partners, or even intimate friends; in short, wherever any trust or confidence is reposed by the one in the other (*Odgers*). Merely labelling a letter "*Private and confidential*," or merely stating, "*I speak in confidence*," will not make a communication confi-

dential in the legal sense of that term, if there be in fact no relationship between the parties which the law deems confidential (*Picton v. Jackman*, 4 C. & P. 25).

(d) **Volunteered information.**—Where a person is so situated that it becomes right in the interests of society that he should tell to a third person certain facts, then if he *bona fide* and without malice does tell them it is a privileged communication (per Blackburn, J., in *Davies v. Snead*, L. R. 5 Q. B. 611).

It appears to be clear that if the defendant reasonably supposed that human life would be seriously imperilled by his remaining silent he may volunteer information to those thus endangered, or to their master, though he be not himself personally concerned. So, if the money or goods of the person to whom he speaks would be in great and obvious danger of being stolen or destroyed. So, too, it appears, the defendant may, without being applied to for the information, acquaint a master with the misconduct of his servants, if instances have come under the especial notice of the defendant which have been concealed from the master's eye. But in most other cases the defendant runs a great risk in volunteering statements which afterwards turn out to be inaccurate, unless indeed he is himself personally interested in the matter, or compelled to interfere by the fiduciary relationship in which he stands to some person concerned. Defendant must sincerely believe in the truth of the statement, and circumstances should be present to his mind which reasonably impose on him a duty to make such statement (*Odgers*).

The fact that there were other persons present than those to whom the defendant was under a duty to make the statement in question will not necessarily destroy the privilege. If their presence was accidental or could not be prevented by the defendant, the privilege will not be lost. Thus, it was held that the privilege which would have attached to defamatory statements made at a meeting of a board of guardians of which the defendant

was a member, was not destroyed by the presence of reporters (*Pittard v. Oliver*, (1891) 1 Q. B. 498).

Communications under the following circumstances were held privileged. Communications made to a father respecting his child (*Whiteley v. Adams*, 13 L. J. C. P. 95); to a master as to his servant (*Masters v. Burgess*, 3 T. L. R. 96); by one friend to another as to a doctor (*Dixon v. Smith*, 29 L. J. Ex. 215), or a tradesman (*Storey v. Challands*, 8 C. & P. 234); by a servant to his master (*Scarle v. Dixon*, 4 F. & F. 250; *Mead v. Hughes*, 7 T. L. R. 291); by an under-master to the head-master (*Hume v. Marshall*, 42 J. P. 136); by an official in the army or navy or any government office to his superior (*Stace v. Griffith*, L. R. 2 P. C. 420); by a master concerning his servant or a child entrusted to his charge, to the parent or guardian of such servant or child (*Fowler v. Homer*, 3 Camp. 294; *Aberdeen v. Macleay*, 9 T. L. R. 539); character of a candidate for an office given to one of his canvassers (*Cowles v. Potts*, 34 L. J. Q. B. 247); by a solicitor to his client (*Wright v. Woodgate*, 2 Cr. M. & R. 573) even though he is not at the time engaged in the conduct of any legal proceedings on his behalf (*Davis v. Reeve*, 5 Ir. C. L. 79); by the secretary of a charity organization society to a stranger as to the deserts of an applicant to such stranger for charity (*Waller v. Loch*, 7 Q. B. D. 619); by a solicitor to his clerk in the discharge of his duty to his client, and in the interests of his client (*Borsius v. Goblet*, (1894) 1 Q. B. 816; *Baker v. Carrick*, (1894) 1 Q. B. 838).

The publication of the minutes of Medical Council, containing a report of their proceedings, comprising a statement that the name of a specified medical practitioner has been removed from the register on the ground that, in the opinion of the Council, he has been guilty of infamous conduct in a professional respect, is, if the report be accurate and published *bona fide* and without malice, privileged (*Allbutt v. Medical Council*, 23 Q. B. D. 400). A, the tenant of a farm, required some repairs to be done at the farm house, and B, the agent of the landlord, directed C to do the work. C did it but in a negligent manner, and during the progress of it got drunk, and some circumstances occurred which induced A to believe that C had broken open his cellar door and obtained access to his cider. A, two days afterwards, met C, in the presence of D, and charged him with having broken open his cellar door, and with having got drunk and spoiled the work. A afterwards told D in the absence of C that he was confident C had broken open the door. On the same day A complained to B that C had been negligent in his work, had got drunk, and he thought he had broken open his cellar-door. Held, that the complaint to B was a privileged communication, if made *bona fide*; and without any malicious intention to injure C. Held, also, that the statement made to C in the presence of D, was also privileged, if made honestly and *bona fide*; and that the circumstance of its being made in the

presence of a third person did not of itself make it unauthorized, and that it was a question to be left to the jury to determine from the circumstances, including the style and character of the language used, whether A acted *bona fide*, or was influenced by malicious motives. Held, also, that the statement to D in the absence of C was unauthorized and officious, and therefore, not protected, although made in the belief of its truth, if it were in point of fact false (*Toogood v. Spyring*, 1 Cr. M. & R. 181).

*Indian cases.*—Plaintiff was a brewer employed by a brewery company, and the defendant was a local manager of the company. The defamatory statements complained of were contained in letters written by the defendant to the directors of the company, and also in a letter written to another brewer in the employ of the company in which he said that the plaintiff “had failed most utterly, and I have been compelled to inform him that you will take the position of senior brewer at the brewery.” Held, that those statements were in the nature of privileged communications (*Leishman v. Holland*, 14 Mad. 51; see *Mills v. Mitchell*, Bourke o. c. 18). Where the Consul of a foreign state wrote some defamatory letters to his Government, reflecting on the character of a commercial house in Calcutta, it was held that such communications were not privileged (*Robert v. Lombard*, 1 Ind. Jur. N. S. 192). Plaintiff was a Hindu widow, and defendant was the headman of her caste. Defendant received anonymous letters imputing bad conduct to the plaintiff. He was requested to call a caste meeting to consider the matter; and he did so. It was decided at this meeting to warn the plaintiff to improve her conduct. The warning was unheeded, and a second meeting was called. Ten persons were selected at this meeting to decide what should be done. Defendant was one of the ten, and he communicated to the general meeting the decision they had come to—namely, that the plaintiff should be excommunicated. The defendant, thereupon, asked the priest of the caste to promulgate this decision to all the members of the caste. The plaintiff sued the defendant for defamation. Held, that the defendant was not guilty in doing any of the above acts, as he merely discharged the duty which devolved upon him as the head of the caste (*Keshavlal v. Bai Girja*, 1 Bom. L. R. 478; 24 Bom. 13).

### (3). *Information for the Public Good.*

(a). **Information as to a crime or misconduct of others.** It is a duty every one owes to society and to the State to assist in the discovery of any crime, dishonesty or misconduct, and to afford all information which will lead to the detection of the culprit. When it comes to the knowledge of any one that a crime has been committed, a duty

is laid on that person, as a citizen of the country, to state to the authorities what he knows respecting the commission of the crime ; and if he states only what he knows and honestly believes he cannot be subjected to an action of damages merely because it turns out that the person as to whom he has given the information is, after all, not guilty of the crime (per Inglis, J., in *Lightbody v. Gordon*, 9 Sc. S. C. 937). For the sake of public justice, charges and communications which would otherwise be slanderous, are protected if *bona fide* made in the prosecution of an inquiry into a suspected crime (per Coleridge, J., in *Padmore v. Lawrence*, 11 A. & E. 382) ; although they may possibly affect the character of a third person (per Parke, B., in *Kine v. Sewell*, 3 M. & W. 302). But the answer must be pertinent to the inquiry ; and, in fact, the reply must be an answer to the question, or reasonably induced thereby, and not irrelevant information gratuitously volunteered (*Soultere v. Allen*, Sir T. Raym. 231 ; *Huntley v. Ward*, 6 C. B. N. S. 514).

(b). **Charges against public officials**—It is the duty of all who witness any misconduct on the part of any public officer to bring such misconduct to the notice of those whose duty it is to inquire into and punish it ; and, therefore, all petitions and memorials complaining of such misconduct, if prepared *bona fide* and forwarded to the proper authorities, are privileged. And it is not necessary that the informant or memorialist should be in any way personally aggrieved or injured : for all persons have an interest in the pure administration of justice and the efficiency of our public offices in all departments of the State (*Odgers*). Every communication is privileged which is made *bona fide* with a view to obtain redress for some injury received, or to prevent or punish some public abuse..... This privilege, however, must not be abused ; for if such

a communication be made maliciously and without probable cause, the pretence under which it is made, instead of furnishing a defence, will aggravate the case of the defendant" (per Best, J., in *Fairman v. Ives*, 5 B. & Ald. 647).

## II. COMMUNICATIONS MADE IN SELF-PROTECTION.

### 1. *Statements necessary to protect defendant's private interests.*

Any communication made by the defendant is privileged which a due regard to his own interest renders necessary. He is entitled to protect himself. But in such cases it must clearly appear not merely that some such communication was necessary, but that he was compelled to employ the very words complained of. If he could have done all that his duty or interest demanded without defaming the plaintiff, the words are not privileged (*Odgers*). "Any one in the transaction of business with another, has a right to use language *bona fide*, which is relevant to that business, and which a due regard to his own interest makes necessary, even if it should directly or by its consequences, be injurious or painful to another; and this is the principle on which privileged communication rests; but defamatory comments on the motives or conduct of the party with whom he is dealing do not fall within that rule" (per Lord Denman, in *Tuson v. Evans*, 12 A. & E. 733. *Emp. v. Slater*, 15 Bom. 351).

It is not essential that, before a person can be held entitled to the privilege of having made a statement in good faith for the protection of his interests, he should establish that every word he has spoken or written is literally true. If, having regard to facts and circumstances within his knowledge, he might, as an ordinarily reasonable and prudent man, have drawn the conclusions which he has expressed in defamatory language for the protection of his own interests, he may fairly be held to have made out his good faith (*Abdul Hakim v. Tej Chander*, 3 All. 815).

The plaintiff, a trader, employed an auctioneer to sell off his goods, and otherwise conducted himself in such a way that his creditors reasonably concluded that he had committed an act of bankruptcy. One of them, the defendant, thereupon sent the auctioneer a notice not to pay over the proceeds of the sale to the plaintiff, "he having committed an act of bankruptcy." It was held by the majority of the Court that this notice was privileged, as being made in the honest defence of defendant's own interests (*Blackham v. Pugh*, 2 C. B. 611). An insurance company may inform a ship-owner that they must refuse to insure his vessel any longer if he put a particular master in command of her (*Hamon v. Falle*, 48 L. J. P. C. 45). The defendants in a printed monthly circular issued to their servants stated they had dismissed the plaintiff for gross neglect of duty. Held, that the occasion was privileged, in the absence of malice or abuse of authority, as it was clearly to the interest of the defendants that their servants should know that gross misconduct would be followed by dismissal (*Hunt v. G. N. Ry.*, (1891) 2 Q. B. 189).

*Indian cases.*—In an action to recover damages for defamation of character brought by the late mooktear and manager of a *parda-nashin* Mahomedan lady who had in a petition to the Munsiff presented that he had discharged the plaintiff from her service, because he had not managed her properties honestly, and had been guilty of misappropriation, it appeared that the plaintiff had rendered no accounts, and had allowed a year to pass before resenting the libel. Held, that the defendant had reasonable grounds for making the statement, and that, in the absence of evidence of malice, the suit was rightly dismissed (*Ameenooddeen v. Khroonissa*, 20 W. R. 60; *Ekbai Bahadoor v. Solano*, 2 W. R. 164). Plaintiffs and defendants were the members of two firms, each creditors of an absconded debtor one B. The plaintiffs' firm brought a suit to recover the sum alleged to be due to them by the said B, and pending that suit the defendants' firm presented a petition to the Court containing the statements complained of, which were principally to the effect that the plaintiffs had prejudiced the petitioners by suing the said B for sums greatly in excess of their just claims against him. The Judge found that there was no malice in fact, but that the statements were untrue and calculated to damage, and he, accordingly, gave a decree to the plaintiffs with damages. Held, that as the defendants were creditors of an absconded debtor and deeply interested in seeing that his estate was not swept off in satisfaction of an excessive claim made by the earliest suitor, they, in presenting a petition pointing out what they considered suspicious elements in the plaintiffs' claim against such debtor, were at all events entitled to the qualified privilege of persons acting in good faith and making communications with a fair and reasonable purpose of protecting their own interest (*Hinde v. Baudry*, 2 Mad. 13). Certain raiyats in a

zemindari village addressed a petition to a Tehsildar praying that the village Munsiff might be retained in office notwithstanding the zemindar's application for his removal. The petition imputed criminal acts to the zemindar, who now sued the petitioners for damages on the ground that the petition contained a false and malicious libel. It was found that in fact the communication was made *bona fide*, and that there was some ground for some of the imputations. Held, that the petition was a privileged communication and the alleged libel was not actionable (*Venkata v. Kotayya*, 12 Mad. 374).

## 2. *Statements provoked by plaintiff.*

Every man has a right to defend his character against false aspersion. It may be said that this is one of the duties which he owes to himself and to his family. If the plaintiff has previously attacked the defendant, any statement made by the latter which is necessary in order to protect himself, and which is in any way relevant to the accusations made against him by the plaintiff, is privileged. Therefore, communications made in fair self-defence are privileged. The privilege extends only to such retorts as are fairly an answer to the plaintiff's attacks (*Odgers*). The privilege in these cases must be used as a shield of defence, not as a weapon of attack.

The privilege may be lost if the extent of publication is excessive, *e. g.*, in a matter of purely local or private importance, it cannot be necessary to write to the "Times" or to advertise. In such a case, the extent given to the announcement is evidence of malice (*Capital & Counties Bank v. Henty*, 7 App. Cas. 741). But where the plaintiff has previously attacked the defendant in the newspapers (*Coward v. Wellington*, 7 C. & P. 531), or in public, and the latter retaliates by publishing in the papers in self-defence, a statement of the case from this point of view, and in so doing makes a defamatory statement concerning the plaintiff, such statement is privileged, if made *bona fide*.

The plaintiff, a barrister, attacked a Bishop before the House of Keys in an argument against a private bill, imputing to the Bishop improper



motives in his exercise of church patronage. The bishop wrote a charge to his clergy refuting these insinuations, and sent it to the newspapers for publication. It was held, that under the circumstances the bishop was justified in sending the charge to the newspapers, for an attack made in public required a public answer (*Laughton v. Bishop of Sodor*, L. R. 4 C. P. 495).<sup>1</sup> Where the policy holder for an insurance company published a pamphlet<sup>2</sup> charging the directors with fraud, and the directors published a pamphlet in reply defending themselves, and accusing the plaintiff of making false and calumnious accusations and further stating that he had upon a certain occasion made statements on oath in direct contradiction of statements which he had previously made in writing; it was held that the defendants did not go beyond the occasion (*Koenig v. Ritchie*, 3 F. & F. 413; *R. v. Valey*, 4 F. & F. 1117).

### 3. *Statements invited by plaintiff.*

If the only publication that can be proved is one made by the defendant in answer to an application from the plaintiff, or some agent of the plaintiff, demanding explanation, such answer, if fair and relevant, will be held privileged, for the plaintiff brought it on himself (*Odgers*). "If a servant, knowing the character which his master will give of him, procures a letter to be written, not with a fair view of inquiring into the character, but to procure an answer upon which to ground an action for a libel, no action can be maintained" (per Lord Alvanley, in *King v. Waring*, 5 Esp. 15).

### III. PROTECTION OF COMMON INTEREST.

Every communication made *bona fide*, upon any subject-matter, with the object of protecting an interest common to the writer or a speaker, and the person to whom it is made, is privileged (*Harrison v. Bush*, 5 E. & B. 344; *Venkata v. Kotayya*, 12 Mad. 377).

This common interest may be in respect of family affairs—*e. g.*, communications made *bona fide* to a lady by her son-in-law as to the character of her intended husband, if he honestly believes him, however erroneously, to be of bad character (*Todd v. Hawkins*, 8 C. & P. 88; *Adams v.*

*Coleridge*, 1 T. L. R. 84); or it may be in respect of money matters—*e. g.*, a letter written by a ratepayer affecting the character of the parish constable, to be read at a parish meeting at which the accounts of the parish were to be considered (*Spencer v. Amerton*, 1 M. & R. 470); or in respect of a particular profession or calling—*e. g.*, any thing said by a life governor of a school to its steward concerning one of the tradesmen employed to supply the school (*Humphreys v. Stilwell*, 2 F. & F. 590); or in respect of any right or duty recognized by the law—*e. g.*, a letter written by a creditor who had been appointed a trustee<sup>\*</sup> in liquidation of a debtor's estate to another creditor (*Spill v. Maule*, L. R. 4 Ex. 232), or by a solicitor writing on behalf of his client, and in the ordinary course of his duty to a third party (*Quartz Hill Gold Mining Co., v. Beall*, 20 Ch. D. 509; *Baker v. Carrick*, (1894) 1 Q. B. 838—*Fraser*).

But in all these cases the privilege will be lost if the statement is made to an unnecessarily large number of persons and thus spread broad-cast (*Duncombe v. Daniell*, 8 C. & P. 222), or contains exaggerated or unwarrantable expressions (*Bromage v. Prosser*, 4 B. & C. 247; *Fryer v. Kinnersley* 15 C. B. N. S. 422; *Senior v. Medland*, 4 H. & N. 843), or extends to matters outside those in which the plaintiff and defendant have a common interest (*Warren v. Warren*, 1 C. M. & R. 250),

The defendants, who carried on an insurance business in London, had at one time engaged the plaintiff as their West-end agent, and, the agency having been terminated, the defendants had written and published and sent to their customers a circular in which they stated that "the agency of Lord William Nevill, at 27 Charles Street, St. James's Square, has been closed by the directors." The plaintiff alleged that this statement was untrue, the engagement having been terminated at his instance, and that the statement was calculated to injure him in his business as an insurance agent. It was held, that there was no evidence of express malice on the part of the defendants, so as to deprive them of the privilege arising from the occasion (*Nevill v. Fine Art &c. Co.*, (1897) A. C. 68).

*Indian case.*—M obtained a divorce from his wife on the ground of her adultery with one S. During the course of those proceedings M wrote letters to certain relations of his wife, in which he made defamatory statements regarding the plaintiff. Held, that it was M's duty to write to his wife's relations to explain his conduct and that the person addressed had an interest in receiving the communications and that therefore the communications were privileged (*Bodycote v. McMorran*, 4 Burma L. R. 212).

#### IV. FAIR REPORTS.

Fair reports of (1) Judicial proceedings; (2) Parliamentary proceedings; (3) Quasi-judicial proceedings; and (4) Proceedings in public meetings, are treated as privileged communications.

##### 1. *Judicial proceedings.*

A fair, substantial, *bona fide*, impartial, and correct or accurate report of the proceedings in any Court of justice is privileged; except where the matters given in evidence are (1) of a grossly scandalous, blasphemous, seditious, or immoral tendency (*In re Evening News*, 3 T. L. R. 255), or (2) expressly prohibited by the order of the Court (*Brook v. Evans*, 29 L. J. Ch. 616), for it is no advantage to the public, or public justice, that such matters should be detailed (*R. v. Carlisle*, 3 B. & Ald. 169). The reason of this privilege is that "the general advantage to the country in having these proceedings made public more than counterbalances the inconvenience to private persons whose conduct may be the subject of such proceedings" (per Lawrence, J., in *R. v. Wright*, 8 T. R. 298).

It is not necessary that the report should be verbatim, it must be "substantially a fair account of what took place" (per Lord Campbell, C. J., in *Andrews v. Chapman*, 3 C. & K. 289). It is sufficient to publish a fair abstract (per Mellish, L. J., in *Millissich v. Lloyds*, 46 L. J. C. P. 404). But eventhough the report is a fair one, yet if it is sent for publication by a person with malicious motives,

an action will lie (*Stevens v. Sampson*, 5 Ex. D. 53). The report must not be one-sided, or false, or highly coloured; and if defamatory comments, allegations, and opinions of the reporter are mixed up with it, the privilege is lost (*Stiles v. Nokes*, 7 East 492). The report should be confined to what takes place in Court (per Lord Campbell, C. J., in *Andrews v. Chapman*, 3 C. & K. 288). It should never be preceded by a title which exaggerates the real facts of the case, otherwise damages may be recovered for the libellous title.

A report of a slanderous complaint publicly heard by a Magistrate without jurisdiction in the matter, or of an application made to him extrajudicially, as for advice, is not privileged (*McGregor v. Thwaites*, 3 B. & C. 24). The test of jurisdiction or otherwise, is the nature of the complaint; it is enough if he had jurisdiction supposing the facts alleged to be made out, though in result they were not (*Collett*).

It is immaterial by whom the report is published. The privilege is the same for a private individual as for a public newspaper (*Millissich v. Lloyds*, 46 L. J. C. P. 404). There is no special privilege for newspapers (*Rumney v. Walter*, 8 T. L. R. 262).

Reports of *ex parte* proceedings are also privileged, whether such proceedings result in the discharge by the Magistrate of the party charged (*Curry v. Walter*, 1 B. & P. 525) or not (*Curry v. Walter*, 1 B. & P. 525; *Usill v. Hale*, 3 C. P. D. 390).

Where judicial proceedings last more than one day, a report published daily is privileged, if fair and accurate, but no comment is allowed until the proceedings terminate (*Levis v. Levy*, 27 L. J. Q. B. 287). A fair and accurate report of the judgment in an action, published *bona fide* and without malice, is privileged, although not accompanied by any report of the evidence given at the trial (*Macdougall v. Knight*, 25 Q. B. D. 1). The publication without malice of a fair and accurate report of proceedings

in open Court before Magistrates upon an *ex parte* application for a summons for perjury is privileged (*Kimber v. Press Asso.*, (1893) 1 Q. B. 65).

## 2. *Parliamentary proceedings.*

Every fair and accurate report of any proceedings in either House of Parliament, or in any committee thereof, is privileged; even though it contain matter defamatory of an individual (*Goffen v. Donnelly*, 6 Q. B. D. 307). A faithful report in a newspaper, of a debate of either House of Parliament, containing matter disparaging to the character of an individual which had been spoken in the course of the debate, is not actionable at the suit of the person whose character has been called in question (*Wason v. Walter*, L. R. 4 Q. B. 73).

Fair and legitimate criticism in newspapers on the conduct or motives of individuals, as disclosed by such reports, is also privileged (*ibid*).

## 3. • *Quasi-judicial proceedings.*

Reports of their proceedings published by quasi-judicial bodies, *bona fide* and without any sinister motive, are privileged (*Albut v. General Council &c.*, 37 W. R. 771). If, however, the statement is published maliciously, the privilege is gone, as there is no *absolute* privilege in such cases (*Royal Aquarium Co. v. Parkinson*, (1892) 1 Q. B. 431). In speeches before local boards, County councils, and the like, although the occasion is privileged, the privilege is not (as in the case of Parliament) absolute, and the speaker is only protected in the absence of express malice. The privilege may be rebutted by showing that from some indirect motive, such as anger, or gross and unreasoning prejudice with regard to a particular subject-matter, the defendant stated what he did not know to be true, reckless whether it was true or false (*Pittard v. Oliver*, (1891) 1 Q. B. 474).

4. *Proceedings in public meetings.*

“ Any meeting *bona fide* and lawfully held for a lawful purpose, and for the furtherance or discussion of any matter of public concern, whether the admission thereto be general or restricted,” is a public meeting. A report in a newspaper of the proceedings of a public meeting is privileged, provided it is (1) fair, (2) accurate, (3) not blasphemous, and (4) not indecent. The privilege may be rebutted by showing (1) that the report was published maliciously ; or (2) that the defendant has refused or neglected on request to insert in the same newspaper a reasonable letter by way of contradiction or explanation of such report. Also the public position of the person criticized and the subject-matter dealt with, must be of a general interest to the whole country ; if the position or matter be only of a limited local kind, or the meeting not necessarily or properly a public one, there is no privilege (*Purcell v. Sowler*, 1 C. P. D. 788).

*Remedies for defamation.*

As to the remedies for defamation, not only may a suit for damages be brought, but the publication of defamatory statements may be restrained by injunction : see Specific Relief Act, I of 1877, s. 55, ill. (e).

**Who can sue.**—*Indian law.*—A suit for defamation can only be brought by the person actually defamed, if the person is *sui juris*, and if not *sui juris*, then under the provisions of the Civil Procedure Code, by his guardian or next friend (*Daya v. Param Sukh*, 11 All. 104). The fact that a defamatory statement has caused injury to other persons does not entitle them to sue (*Luckumsey v. Hurbun*, 5 Bom. 580).

In a suit for damages for defamation, it appeared that the words complained of were spoken by the defendant to the plaintiff in the presence of a third party and were to the effect that the plaintiff's wife had committ-

ed adultery with a pariah, and that her children had been born to the pariah. In holding that the suit was not maintainable by the plaintiff, Muttusami Ayyar, J., remarked: "Suppose the wife brought an action against defendant, would it be a good defence to say that though she was the person slandered, it was only intended to insult her husband? If not, the rule that a slanderer should not be liable to as many actions as there are relations would be violated. I would follow the principle laid down in *Subbaiyar v. Kristnaiyar*, (1 Mad. 383), *Luckumsey v. Hurbun* (5 Bom. 580), and *Daya v. Paramasukh* (11 All. 104)" (*Brahmanna v. Ramakrishna*, 18 Mad. 25).

It has been held that a brother cannot sue for slander of his sister (*Subbaiyar v. Kristnaiyar*, *sup.*); nor a heir and nearest relation of a deceased person for defamatory words spoken of the deceased (*Luckumsey v. Hurbun*, *sup.*); nor a father for slander of his daughter (*Daya v. Paramasukh*, *sup.*)

**Husband and wife.**—Whenever words actionable *per se* are spoken of a married woman, she may sue alone, or she may join her husband as co-plaintiff, in which case he will be entitled to recover in the same action for any special damage that may have occurred to him (*Harwood v. Hardwick* 2 Keb. 387). When the words are not actionable *per se*, she may sue, provided she can show that some special damage has followed from the words to *her*. That special damage has accrued to her husband in consequence of such words will not avail her (*Ibid*); he alone can sue for such damage, although it is *her* reputation that has been assailed (*Odgers*, see also *Luckumsey v. Hurbun*, 5 Bom. 583).

A wife, living apart from her husband under a separation order, can maintain an action of libel against him (*Robinson v. Robinson*, 13 T. L. R. 564).

**Corporation.**—The right of a corporation to sue for libel is confined to the protection of their property. It cannot, for instance, maintain an action for libel charging the corporation with corruption, for it is only the individuals, and not the corporation in its corporal capacity, who can be guilty of such an offence (*Mayor of Manchester v. Williams*, (1891) 1 Q. B. 94). But it can maintain an action of libel in respect of a statement reflecting on its

character in the conduct of its business (*South Hetton Coal Co. v. N. E. N. Asso.*, (1894) 1 Q. B. 133).

A corporation is liable for libel (*Nevill v. Fine Arts Ins. Co.*, (1895) 2 Q. B. 156) or slander published by its servants or agents, where such publication has been expressly authorized (*Yarborough v. Bank of England*, *sup.*; *Latimer v. W. M. News*, 25 L. T. 44; *Abrath v. N. E. Ry.*, 11 App. Cas. 253); or in the case of libel where such publication is in pursuance of the general orders given to such servants or agents (*Whitfield v. S. E. Ry.*, E. B. & E. 115).

**Damages for Libel and Slander.**—The damages recoverable in actions for defamation will materially depend upon the nature and character of the libel, the extent of its circulation, the position in life of the parties, and the surrounding circumstances of the case (*Tripp v. Thomas*, 3 B. & C. 427).

The damages must be assessed once for all (*Gregory v. Williams*, 1 C. & K. 568); no fresh action can be brought for any subsequent damage (*Fither v. Veal*, 12 Mod. 542), except where the words are not actionable *per se*. The Court should take into consideration not only the damage that has accrued, but also such damage, if any, as will arise from the defendant's defamatory words in the future (*Townsend v. Hughes*, 2 Mod. 150; *Ingram v. Lawson*, 1 Scott 471).

A civil Court is not bound to give damages for defamation after the defendant has been convicted and fined for the offence in the criminal Court where plaintiff has suffered no actual damage (*Ooma Churn v. Girish Chunder* 25 W. R. 22).

**Aggravation of damages.**—The violence of the defendant's language, the nature of the imputation conveyed, and the fact that the defamation was deliberate and malicious, will of course enhance the damages. The Court will



also consider the rank or position in society of the parties, the fact that the attack was entirely unprovoked, that the defendant could easily have ascertained that the charge he made was false. It may also be shown that the defendant was culpably reckless or grossly negligent in the matter. The defendant's subsequent conduct may aggravate the damages, *e. g.*, if he has refused to listen to any explanation, or to retract the charge he made, or has only tardily published an inadequate apology. The defendant's conduct of his case, even the language used by his counsel at the trial, may aggravate the damages (*Darby v. Onsley*, 25 L. J. Ex. 230).

The following factors should also be taken into consideration :

(1). *Extent of publication*.—The extent of the damage which defamatory matter causes must clearly depend to a great degree upon the extent of the publicity given. It is one thing for a man to be libelled in a private letter read by a single correspondent, another for him to be held up to the hatred, contempt, or ridicule of the general public in a newspaper or placard.

(2). *Spirit and intention*.—The spirit and intention of the party publishing a libel are fit to be considered by a Court in estimating the injury done to the plaintiff (*Pearson v. Lemaitre*, 5 M. & G. 720).

(3). *Special damage*.—A plaintiff is entitled to damages by reason of the mere probability that consequences injurious to him may ensue from the defamation, but he may strengthen his case by proving that such consequences have in fact ensued.

**Mitigation of damages.**—It is permissible to a defendant to seek to mitigate the damages to be awarded against him, by proving circumstances which show that he did not

act with deliberate malice, or by impeaching the general reputation of the plaintiff.

1. *Evidence falling short of a justification.*—A defendant may give evidence in mitigation of damages that a certain specified portion of the defamatory words is true, provided such portion conveys a distinct imputation on the plaintiff and is divisible from the rest and yet intelligible by itself (*McGregor v. Gregory*, 11 M. & W. 287; *Churchill v. Hunt*, 2 B. & Ald. 685; *Clarke v. Taylor*, 2 Bing. N. C. 654).

2. *Absence of malice.*—In every case, the defendant may, in mitigation of damages, give evidence to show that he acted in good faith and with honesty of purpose and not maliciously (*Pearson v. Lemaitre*, 5 M. & G. 700). The defendant's subsequent conduct may mitigate the damages, *e. g.*, if he showed himself open to argument, listened to the explanations that were offered him, stopped the sale of the libel as soon as a complaint reached him.

3. *Apology.*—In an action for libel contained in any public newspaper or other periodical publication, it shall be competent to the defendant to plead that such libel was inserted in such newspaper or periodical publication without actual malice and without gross negligence, and that before the commencement of the action, at the earliest opportunity, an apology was asked (6 & 7 Vic. c. 96, s. 2).

4. *Mere repetition.*—If the defendant in repeating the story as it reached him gives it as hearsay, and states the source of his information, then, but only then, is the fact that he did not originate the falsehood, but innocently repeated it, allowed to tell in his favour, as proving that he bore the plaintiff no malice (*R. v. Burdett*, 4 B. & Ald. 74; *Mullet v. Hulton*, 4 Esp. 248).

5. *Provocation.*—It is a mitigating circumstance if the publication of the defamatory matter takes place under cir-

cumstances of strong provocation. Such provocation must, however, be *in pari materia* with retaliation. Evidence that the plaintiff had been in the habit of libelling the defendant is admissible in mitigation of damages (*Finnerty v. Tipper*, 2 Camp. 76).

6. *Bad reputation of the plaintiff*.—It may be shown in mitigation that the plaintiff's previous character was so notoriously bad that it could not be impaired by any fresh accusation, even though undeserved. General evidence of bad character is admissible in mitigation, since damages must depend upon the reputation which the plaintiff already had; otherwise the same measure of damage would be given to a thief or a prostitute as to an honest man or woman.

**Injunction.**—The Court has jurisdiction in an action of libel or slander to restrain by injunction either before or at the trial any further publication of such libel or slander, but in the former case the jurisdiction would be exercised with great caution (*Quartz Hill Gold Mining Co. v. Beall*, 20 Ch. D. 501). In order to obtain an *interim* injunction the plaintiff must prove that the words complained of are untrue (*Burnett v. Tak*, 45 L. T. 743; *Collard v. Marshall*, (1892) 1 Ch. 571); and that, therefore, any subsequent publication by the defendant would be *mala fide* (*Halsey v. Brotherhood*, 19 Ch. D. 336), and, further, that unless at once restrained, such statements will cause immediate and irreparable injury to person or property (*Solomon v. Knight*, (1891) 2 Ch. 294). Where the words complained of affect the plaintiff in the way of his business, irreparable injury would be presumed (*Thomas v. Williams*, 14 Ch. D. 864). Grant of an *interim* injunction involves a decision by the Court on motion of the whole question at issue in the suit—libel or no libel—a decision which the Court will naturally be very loth to make, except in the clearest cases

(*Bonnard v. Perryman*, (1891) 2 Ch. 269; *Monson v. Tussad*, (1894) 1 Q. B. 671). If the evidence is conflicting as to the truth of statements complained of, the Court will, of course, not grant an injunction (*Plumby v. Perryman*, (1891) W. N. 64). Where the libel complained of is on the face of it too gross and absurd to do the plaintiff any material harm an injunction will not be granted.

The defendant in a libel action after losing the case continued to publish documents repeating the libels complained of. Held, that the Court has jurisdiction to grant an interlocutory injunction to restrain further publication of the libel (*Collard v. Marshall*, (1892) 1 Ch. 571). But such injunction would be refused on the ground that there was no danger of injury to plaintiff in person or property as to make it right to grant it (*Solomons v. Knight*, (1891) 2 Ch. 291).

*Indian law.*—In India, as in England, the Courts have jurisdiction to restrain a libel by injunction, *viz.*, under the terms of the first clause of section 54 of the Specific Relief Act. The High Court of Bombay held in 1876 that the Court would not restrain by injunction the publication of matter alleged to be defamatory, but that decision was prior to the commencement of the Specific Relief Act which came into force on the 1st May 1877 (*Shepherd v. The Trustees of the Port of Bombay*, 1 Bom. 132; following *Prudential Assurance Co. v. Knott*, L. R. 10 Ch. 142).

*Joint action.*—An action for *slander* cannot be brought jointly against several defendants; separate actions should be brought against each. Each person sued for verbal slander is responsible only for what he himself has uttered, and plaintiff is not entitled to bring him before the Court while he is proving his case against another defendant for what the first defendant is not himself responsible. In *libel*, each person is liable, for the entire publication, and therefore they may be properly sued together (per Pontifex, J., in *Nilmadhub v. Dookeeram*, 15 B. L. R. 166). But an action for *slander* may be brought jointly against

several defendants where the words spoken are not actionable *per se*, but only become so by reason of the special damage, which is the result of the conjoint action of all the defendants (*Woozeerumissa Bibee v. Syed Mahomed*, 15 B. L. R. 166*n.*).

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## CHAPTER XIV.

### WRONGS RELATING TO DOMESTIC RIGHTS.

1. Marital rights.
  2. Parental rights.
  3. Tutelary rights.
  4. Rights to the services of servants.  
    (a) Relation of master and servant *ex contractu*.  
    (b) Relation of master and servant *ex gratia*.
- } SEDUCTION.

IN the earlier stages of the Common law a wife, and unemancipated persons, *i. e.*, minor, children and servants were regarded as occupying a subservient, if not unfree, *status*, and the *paterfamilias* was considered to have a right to the *consortium* of his wife, to the custody of his children, and the services of wife, children and servants.

#### 1. *Marital rights.*

By marital rights is meant the right of a husband to the society of his wife, and to the exclusive possession and control of her person (*Innes*). A husband can bring an action against persons who abduct, or entice, or keep away from him, his wife, or who harbour or maintain her after she has deserted his society (*C. & L.*, 190).

The gist of the action is the loss of the *consortium* of the wife, which term implies an exclusive right against an invader, to her affection, companionship and aid. It is not necessary to the maintenance of the action that there should be any pecuniary injury to the husband (*Weedon v. Timbrell*, 5 T. R. 359; *Winsmore v. Greenbank* Willes 577).

A difference is deemed to exist, however, between the act of a *parent* and that of *other persons* with regard to persuading a wife to leave her husband. In the case of one *not a parent*, it is not necessary that bad motives

should have inspired the act (*Hutcheson v. Peek*, 5 Johns. 196). Such a person has no right to entice or persuade a wife to leave her husband. It does not follow, however, that mere advice to a married woman by a stranger to leave her husband, upon representations by the wife, would be unlawful; advice in such a case is one thing, and enticement is another. In regard to a *parent*, it is considered that it is no breach of duty to the husband for such a person, upon information that his daughter is treated with cruelty by her husband, or is subjected to other gross indignities such as would justify a separation, to go so far as to persuade her to depart from her husband; though it subsequently appears that the parent's persuasion was based on wrong information. The parent must either have enticed his daughter to leave, or to stay away out of ill-will towards, her husband, and not by reason of any good ground for that separation; or that he must have some end to gain of personal benefit to himself (*Bigelow*, 171). In regard to cases of 'criminal conversation' (adultery) with one's wife, an action was formerly given by the Common law. It rested upon the same ground as that for enticing the wife away from her husband, to wit, the loss of *consortium* (*Weedon v. Timbrell*, 5 T. R. 357). This action is abolished by an Act of Parliament in 1857 and the redress turned over to the Divorce Court (20 & 21 Vic. c. 85).

A suit for damages is maintainable by a Mussalman against persons who without lawful excuse have persuaded and procured his wife to remain absent from him and live separately. A Mussalman lawfully married to a girl who has attained puberty can maintain a suit for damages against the father of the girl, and against an alleged husband of the girl, for wrongfully persuading her to remain absent from the plaintiff's society, and for detaining her away from him (*Muhammad Ibrahim v. Gulam Ahmed*, 1 B. H. C. o. c. J. 236). A mere attempt to commit adultery is not an actionable wrong (*Kathappudyan v. Muthappudayan*, 10 M. L. J. R. 230).

*Leading case.*—**Winsmore v. Greenbank.**

**Damages.**—In actions for adultery, the damages are always exemplary, and the amount is affected by a consideration of the state of affection, or otherwise, in which the husband and wife previously lived ; by the fact of their being separated at the time ; by the negligence of the husband in exposing his wife to the defendant ; by his ill-treatment of his wife, or his general immoral conduct ; by the previous immoral character or otherwise of the wife ; or by the conduct of the defendant, as having been a gross breach of hospitality or friendship, or, on the contrary, his having supposed the wife to be single, or his being misled or solicited by her into the crime. Where the action is not for the adultery, but for some special consequent loss, the damages will be strictly limited to such (*Collett*).

## 2. *Parental rights.*

These are rights to the custody and control of children, and to the produce of their labour till they arrive at the age of twenty-one, subject to the proviso, that after attaining the age of sixteen, a female child may discharge herself from the control of her father ; but before that age only when there is want of proper parental care or control. Children over twenty-one, unless rendering actual service, are not within this rule, but in the position of ordinary servants.

The rights are infringed by any act which interferes prejudicially with the custody of or control over children by their parent, or with the advantage which he derives from their services, if they were old enough to render any, the person interfering having notice of the right of the parent.

The rights are acquired on the birth of the child. They may be delegated to a school master or to a master of an apprentice.



### 3. *Tutelary rights.*

A tutelary right, or a right of a person as a guardian over a child, is conferred by the last will of the father, or by a deed executed by him, or by a judicial act, or by devolution on certain classes of relatives. In the case of persons mentally incapable, a right of guardianship over them is conferred by the Court.

This right is violated by any person, with notice of the right of the guardian, arrogating to himself the control which is vested in the guardian (*Innes*). Any one standing in *loco parentis*, and receiving, to his own benefit, the services of a child, is entitled to maintain an action for loss of services against any one who wrongfully interrupts the rendering of them, or makes the full rendering of them impossible (*Mainvell v. Thompson*, 2 C. & P. 303).

### 4. *Rights to personal services of servants.*

(a) **Master and servant ex contractu.**—Every person who maliciously, or with notice, interrupts the relation subsisting between master and servant—(1) by procuring the servant to depart from the master's service, or (2) by harbouring and keeping him as servant after he has quitted it, and during the time stipulated for as the period of service, whereby the master is injured commits a wrongful act (*Lumley v. Gye*, 2 E. & B. 216).

It is clear that the procurement of the violation of a right is a cause of action in all instances where the violation is an actionable wrong (per Erle, C. J., in *Lumley v. Gye*). "A person who procures the act of another can be made legally responsible for its consequences...if he knowingly and for his own ends induces that other person to commit an actionable wrong" (per Lord Watson, in *Allen v. Flood*, (1898) A. C. 96). It has been recently said by

Lord Macnaghten that "the decision in *Lumley v. Gye* was right, not on the ground of malicious intention—that was not, I think, the gist of action—but on the ground that a violation of legal right committed knowingly is a cause of action, and that it is a violation of legal right to interfere with contractual relations recognised by law if there be no sufficient justification for interference" (*Quinn v. Leatham*, (1901) A. C. 510).

A person who contracts with another to do certain work for him is the servant of that other till the work is finished, and no other person can employ such servant to the prejudice of the first master (*Blake v. Lanyon*, 6 T. R. 221).

An action lies against a third person who maliciously induces another to break his contract of exclusive personal service with an employer which thereby would naturally cause, and did in fact cause, an injury to such employer, although the relation of master and servant may not strictly exist between the employer and employed (*Bowen v. Hall*, 6 Q. B. D. 333; *De Francesco v. Barnum*, 63 L. T. 514). It has also been held that an action is maintainable, not merely for maliciously procuring breaches of contracts entered into by plaintiff with third persons, but also for maliciously conspiring together to injure the plaintiff by preventing persons from entering into contracts with him (*Temperton v. Russell*, (1893) 1 Q. B. 715).

"The principle involved in the case of *Lumley v. Gye* cannot be confined to inducements to break contracts of service, nor indeed to inducements to break *any* contracts. The principle which underlies the decision reaches all wrongful acts done intentionally to damage a particular individual and actually damaging him. *Temperton v. Russell* ought to have been decided and may be upheld on this principle. That case was much criticised in *Allen v. Flood*,

and not without reason ; for, according to the judgment of Lord Esher, the defendants' liability depended on motive or intention alone, whether anything wrong was done or not. This went too far, as was pointed out in *Allen v. Flood*. But in *Temperton v. Russell*, there was a wrongful act, namely, conspiracy and unjustifiable interference with Bretano, who dealt with the plaintiff. This wrongful act warranted the decision, which I think was right " (per Lord Lindley in *Quinn v. Leatham*, (1901) A. C. 535).

The Justification which will be sufficient to exonerate a person from liability for his interference with the contractual rights of another must be an equal or superior right in himself, and it will not be sufficient for him to shew that he acted *bona fide* or without malice, or in the best interests of himself or others, or on a wrong understanding of his own rights (*Read v. Friendly Society of Operative Stonemasons &c.*, (1902) 2 K. B. 88). A person who on being asked gives honest and *bona fide* advice to another which induces him to break a contract of service with a third person is not liable to an action at the suit of that third person, eventhough he has sustained damage by the breach of the contract ; and the same is the case where several persons have combined to give the advice, if they have no malicious intention to injure the third person (*Glamorgan Coal Co. v. South Wales Miners' Asso.*, (1903) 1 K. B. 118).

An action will not lie for the *mere* harbouring or sheltering a person, who is under a contract of service to another even with notice of such contract of service (*Brukowsky v. Thacker, Spink & Co.*, 6 B. L. R. 107).

Where defendant, a manager of a theatre, induced a third party to break an engagement with plaintiff, the manager of a rival theatre, to sing at his theatre ; it was held that the plaintiff was entitled to recover damages (*Lumley v. Gye*, 2 E. & B. 216).

(b) **Master and servant *ex gratia*.**—An action could be maintained for interrupting, with notice, the *gratuitous* relation of master and servant. It was sometimes supposed that inasmuch as the master in such a case could not require the services, he had no right to them which could be infringed. But this view does not now obtain. Though a person may not be able to require the bestowment of a gratuity, he has a right to it when it is bestowed, and in the course of receiving it, and no one may interrupt his actual enjoyment of the gratuity.

No action can be maintained for mere harbouring a servant *ex gratia*, though with notice; the action lies solely for enticing the person away or otherwise interrupting the performance of the service while the servant is disposed to, and engaged in, the performance of it. When the servant has put an end to the relation, the rights of the master at once terminate (*Bigelow*, 161).

**Damages.**—Damages for the mere seducing away of an actual servant from the employment of the master would be regulated by the actual money loss resulting from the act, unless where strong evidence of malice was shown. In estimating the injury sustained, the costs are not limited to the time during which the servant was bound to continue with his master (*Mayne*).

No action will lie against a seducer of a servant when the master has recovered against the latter a stipulated penalty, agreed on in case of his leaving the service (*Bird v. Randall*, 3 Burr. 1346).

The workmen of a piano-maker were enticed away from him, and it appeared that they were engaged for no fixed time, but worked by the piece. His income from his trade was £800 per annum and a verdict for £1,600 was held not to be excessive (*Gunter v. Ashtor*, 4 M. P. C. 72).

### *Seduction.*

In the case of female children, the father or guardian, and in the case of female servants, the employer has a

right of action for seduction, *i. e.*, for the debauching of such child or servant. To support the action it is necessary

(1) that there must be proof of actual service of some kind, however slight, at the date of seduction (*Hedges v. Tagg*, L. R. 7 Ex. 283; *Davies v. Williams*, L. R. 10 Q. B. 725); and

(2) the child or servant must have been rendered ill and incapable to render service in consequence of the seduction, apparently whether it did or did not result in pregnancy and confinement (*Manvell v. Thomson*, 2 C. P. 303; *Eager v. Greenwood*, 1 Ex. Rep. 61). Loss of service must be alleged and proved, at the trial, or the plaintiff will fail, notwithstanding the production of evidence conclusive as regards the guilt of the defendant; for, the wrong done by his act the English law does not esteem *per se* as an *injuria*, using that word in its strict sense, but merely as *damnum sine injuria*, for which, consequently an action will not lie (*Broom*). The foundation of the action by a father to recover damages against the wrong-doer for the seduction of his daughter, has been uniformly placed, from the earliest times hitherto, not upon the seduction itself, which is the wrongful act of the defendant, but upon the loss of service of the daughter, in which service he is supposed to have a legal right or interest (per Tindal, C. J., in *Grinnell v. Wells*, 7 M. & G. 1033; *Rist v. Faux*, 4 B. & S. 409).

A girl *under* twenty-one is presumed to be in the service of her father, or other person, who stands in *loco parentis*, with whom she lives, whenever she is not actually in the service of another (*Terry v. Hutchinson*, L. R. 3 Q. B. 599), or where she has been got into his service by a person for the purpose of seducing her (*Speight v. Oliveira* 2 Stark. 493). It is sufficient that the daughter was living with her father, forming part of his family, and liable to

his control and command. The right to the service is sufficient (per Littledale, J., in *Maunder v. Venn*, M. & M. 323). Evidence of an actual contract of service is not necessary but some slight service *de facto*, not necessarily menial service, must be proved, in all cases where the girl is *not* under twenty-one (*Harper v. Luffkin*, 7 B. & C. 387; *Evans v. Walton*, L. R. 2 C. P. 615). Slight acts of household duty as making tea or milking cows would be sufficient in such cases (*Bennett v. Allcott*, 2 T. R. 166; *Rist v. Faux*, 4 B. & S. 409; *Carr v. Clarke*, 2 Chit. R. 261).

Where the girl is in the service of one man at the time of the seduction, of another at the time of the pregnancy and illness, no action lies. The first master could not sue, because there was no illness and loss of service while she was with him, and the second could not, because the woman was not seduced while in his service (*Davies v. Williams*, 10 Q. B. D. 725). When death is caused by seduction probably no action can be maintained (*Osborn v. Gillett*, L. R. 8 Ex. 88).

In the case of parents the action is based upon a bare fiction of service, though for that fiction there must be in some shape or other the relation of master and servant existing between the plaintiff and the person seduced at the time when the seduction takes place (per Kelly, C. B., in *Hedges v. Tagg*, L. R. 7 Ex. 238). But in the case of masters it is based upon an actual contract of service. It is not necessary that there should be any payment of wages (*Evans v. Walton*, L. R. 2 C. P. 615).

**Seduction.**—Plaintiff's daughter, being under age, left his house and went into service. After nearly a month, the master dismissed her at a day's notice and the next day on her way home the defendant seduced her; it was held that as soon as the real service was put an end to by the master, whether rightfully or wrongfully, the girl intending to return home, the right of her father to her services revived, and there was, therefore sufficient evidence of service to maintain an action for the seduction (*Terry v.*

*Hutchinson*, L. R. 3 Q. B. 509). When the child is only absent from her father's house on a temporary visit, there is no termination of her services, provided she still continues, in point of fact, one of his own household (*Genffith v. Teetgen*, 15 C. B. 344). Plaintiff's daughter was seduced in the house and service of the plaintiff, her mother; and the day after she left Ireland for America. But finding herself pregnant while in service there, she returned to her native country, and went to stay at her sister's house where she was confined. She afterwards returned to the house of her mother. Held, that there was a sufficient loss of service (*Long v. Keightley*, 11 Ir. R. C. L. 221). The Court distinguished the case of *Hedges v. Tagg*, given below, on the ground that in it the girl's confinement happened when she was in the service of another; while in this case she was constructively in the service of the plaintiff directly she returned to Ireland. Where the daughter lived at, and assisted in the household work, after serving elsewhere during the whole day, it was held sufficient evidence of service to support an action (*Rist v. Faur*, 32 L. J. Q. B. 387).

**No seduction.**—Where the daughter, though under age, is acting as house-keeper to another person at the time of seduction and had no intention at the time of the seduction to return to her father's house, though she afterwards did return there while within age in consequence of the seduction, and was maintained by her father; it was held that the action will not lie (*Dean v. Peel*, 15 East 45); not even when she partly supports her father (*Manley v. Field*, 29 L. J. C. P. 79). Plaintiff's daughter was in service as governess and was seduced by the defendant whilst on a visit to the plaintiff, her mother. During her visit she gave some assistance in household duties. At the time of her confinement she was in the service of another employer, and afterwards returned home to her mother; it was held that there was no evidence of the service at the time of seduction and that the action must fail also on the ground that the confinement did not take place while the daughter was in the plaintiff's service (*Hedges v. Tagg*, L. R. 7 Ex. 283). The plaintiff's daughter, who was in the service of the defendant, was permitted to go out once a week for an afternoon and evening. On such occasions she went to her father's house, and assisted in household duties. In an action by the plaintiff for the seduction of his daughter by the defendant while she was in the latter's service, it was held that there was no evidence of the relation of master and servant between the plaintiff and his daughter to support the action (*Whitbourne v. Williams*, (1901) 2 K. B. 722).

**Indian case.**—A Hindu sued for compensation for the loss of his daughter's services in consequence of her abduction by the defendant. The daughter was a married woman, who had been deserted by her husband, and at the time of her abduction was living with the plaintiff, her father; it was held

by Stuart, C. J., that the suit by the father for compensation for the loss of his daughter's services in consequence of her abduction was under the circumstances maintainable; but it was held by Oldfield, J., that a suit by a Hindu father for the loss of his daughter's services in consequence of her abduction is not maintainable (*Ram Lal v. Tula Ram*, 4 All. 97).

*Leading cases.*—**Terry v. Hutchinson; Dean v. Peel.**

**Damages.**—Where an action for seduction lies, the damages are always exemplary and aggravated by the circumstances of seduction (*Irwin v. Dearman*, 11 East 23) without the slightest regard to the actual value of the services lost, during the consequent pregnancy or illness, the supposed sole foundation of the action (*Bedford v. M'kowl*, 3 Esp. 120). The means of the defendant ought not to be enquired into, or to affect the amount of damages (*Hodsoll v. Taylor*, L. R. 8 Q. B. 79). It is an aggravation that the seduction was affected under the guise of honourable addresses (*Dodd v. Norris*, 3 Camp. 519; *Tullidge v. Wade*, 3 Wils. 18). High position of the parties may be an aggravation of the wrong (*Andrews v. Askey*, 8 C. & P. 9). It is a mitigation that the woman seduced was a person of loose, immodest, or immoral character, or that the plaintiff was grossly negligent in exposing her to the defendant (*Reddie v. Scott*, 1 Peake, 240—*Collett*). Actual damage, expenses incurred through a servant's or daughter's illness, loss which the plaintiff has sustained by the society and comfort of a child who has been seduced, the dishonour he has received, and the anxiety and distress which he has suffered must be taken into consideration (*Bedford v. M'kowl*, 3 Esp. 120; *Terry v. Hutchinson*, L. R. 3 Q. B. 597).

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## CHAPTER XV.

### WRONGS OF MALICE.

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|---------------------------|------------------------------------------------------|
| 1. Slander of Title.      | 5. Maintenance.                                      |
| 2. Slander of Goods.      | 6. Conspiracy.                                       |
| 3. Malicious Prosecution. | 7. Malicious interference with the rights of others. |
| 4. Malicious arrest.      |                                                      |

#### 1. *Slander of Title.*

SLANDER OF TITLE consists of a false, malicious statement in writing, printing, or by word of mouth, injurious to any person's title to property, and causing special damage to such person. If lands or chattels are about to be sold by auction, and a man declares in the auction-room, or elsewhere, that the vendor's title is defective, that the lands are mortgaged, or that the chattels are stolen property, and so deters people from buying, or causes the property to be sold for a less price than it would otherwise have realized, this is a slander upon the title of the owner, and gives him a *prima facie* claim for compensation in damages (*Gerard v. Dickenson*, Cro. Eliz. 196).

The plaintiff, in order to sustain the action, must essentially prove:—

(1). That the statement is false (*Brook v. Rawl*, 3 Ex. D. 524). If there be such a flaw in the title as the defendant asserted, no action lies. It is for the plaintiff to prove it false, not for the defendant to prove it true (*Burnett v. Tak*, 45 L. T. 743).

(2). That the statement was made *mala fide* and is malicious (*Pater v. Baker*, 3 C. B. 868; *Haddon v. Lott*, 15 C. B. 411). There must be malice express or implied. It is implied when a stranger, having no interest, interferes to

make the assertion. So also it will be implied where the statement is not only untrue, but made without reasonable and probable cause. If the statement is made in the *bona fide* assertion of defendant's own right, real or supposed, to the property, no action lies.

(3). That the words go to defeat his title to property. The property may be either real or personal; and the plaintiff's interest therein may be either in possession or reversion. It need not be even a *vested* interest, so long as it is anything that is saleable or that has a market value (*Odgers*).

It makes no difference, whether the defendant's words be spoken, or written, or printed; save as affecting the damages which should be larger where the publication is more permanent or extensive, as by advertisement (*Malachy v. Soper*, 3 Bing. N. C. 371).

(4). That special damage has resulted from the slander. The special damage must always be such as naturally or reasonably arises from the use of the words (*Haddon v. Lott*, 15 C. B. N. S. 411). "An action for slander of title is not properly an action for words spoken or for a libel written and published, but an action on the case for special damage, sustained by reason of the speaking or publication of the slander of the plaintiff's title" (per Tindal, C. J., in *Malachy v. Soper*, 3 Bing. N. C. 371; Big. L. C. 42). There must be *damnum et injuria*; the *injuria* consists in the unlawful words maliciously spoken, and the *damnum* is the consequent money loss to the plaintiff.

An action for **slander of title** differs from an action of **defamation** in several respects.—

(1). The words are not defamatory: they do not disparage the plaintiff's moral character, or his solvency, skill, business capacity, &c.; they merely attack on something, or on his title to something.

(2). The words will be equally actionable whether written or spoken.

(3). Special damage must in all cases be proved.

(4). There is no presumption that the words are untrue : the *onus* lies on the plaintiff to prove them untrue.

(5). Malice will not be presumed ; the plaintiff must give some *prima facie* evidence that the defendant acted maliciously, or, at all events, without lawful occasion or reasonable cause.

(6). A right of action for defamatory words dies with the person defamed ; but this action survives to his executor to the extent that any damage can be shown to the estate of the deceased (*Hatchard v. Mege*, 18 Q. B. D. 771).

Plaintiff was possessed of certain shares in a silver mine, touching which shares certain claimants had filed a bill in Chancery, to which plaintiff had demurred. Held, that without alleging special damage, plaintiff could not sue defendant for falsely publishing that the demurrer had been over-ruled ; that the prayer of the petition (for the appointment of a receiver) had been granted ; and that persons duly authorized had arrived at the mine (*Malachy v. Soper*, 3 Bing. N. C. 371). Where defendants, coach-owners, used the name of a hotel on their coaches and the drivers' caps, so as to suggest that they were authorized and employed by the hotel-keeper to ply between the hotel and the railway station ; but the plaintiffs were the coach-owners authorized and employed by the hotel ; it was held that the defendants must not falsely hold themselves out as having the patronage of the hotel though they could freely compete with the plaintiffs for the carriage of passengers and goods to the hotel, and could advertise their intention of so doing in any honest way (*Marsh v. Billings*, Big. L. C. 49 ; 7 Cush. 322). Plaintiff had contracted for the purchase of certain wood, but he was unable to obtain delivery owing to defendant falsely alleging an agreement under which he had a lien on the goods for monies advanced to the plaintiff. Held, that there was a good cause of action for slander of title (*Green v. Button*, 2 Cr. M. & R. 707). A purchaser is not liable to an action at law for having depreciated to the vendor the value of the property, or its chance of sale (*Vernon v. Keys*, 12 Esp. 632) ; nor will the action lie against a stranger for preventing a sale by giving notice of his claim upon the estate, unless it be shown that such notice was given maliciously (*Hargrave v. Le Breton*, 4 Burr. 2422 ; *Blackham v. Pugh*, 2 C. B. 611 ; *Pater v. Baker*, 3 C. B. 831). If the defendant acted *bona fide*, the action could not be maintained, although a man of sound sense and a

knowledge of business would not have uttered the slander (*Pit v. Donovan*, 1 M. & S. 639 : see, *Halbronn v. International Horse Exchange &c.*, (1903) 1 K. B. 270).

*Leading case.*—**Malachy v. Soper.**

**Damages.**—The special damage must be proved, and that will, in part, be the measure of damages ; this damage may consist in the property having on a sale realized a less price than it otherwise would ; or in the owner being put to other necessary expenses in consequence (*Brooks v. Rawl*, 4 Ex. D. 524) ; but another essential ingredient, which will also affect the measure of damages, is the presence of malice (*Malachy v. Soper*, 3 Bing. N. C. 371). The want of probable cause does not necessarily lead to an inference of malice neither does the existence of probable cause afford any answer to the action (*Pater v. Baker*, 3 C. B. 868—*Collett*).

## 2. Slander of Goods.

An untrue statement, disparaging a man's goods, published without lawful occasion, and causing him special damage is actionable (*Western Counties Manure Co. v. Lawes Chemical Manure Co.*, L. R. 9 Ex. 218 ; *White v. Mellin*, (1895) A. C. 154) although no imputation is cast on the plaintiff's private or professional character. It is not necessary to prove actual malice, it is sufficient if it be made without reasonable cause.

To maintain an action for slander of goods three things should be proved :—

- (1). That the defendant had disparaged plaintiff's goods ;
- (2). That such disparagement was false ; and
- (3). That damage had resulted or was likely to result (per Lord Herschell in *White v. Mellin*, (1895) A. C. 158 ; *Western Counties Manu. Co. v. Lawes Chemical Manu. Co.*, L. R. 9 Ex. 218).

It is not actionable for a man to commend his own goods, or to advertise that he can make as good articles as any other person in the trade (*Harman v. Delany* 2 Str. 898). A statement by a trader that his own goods are superior to those of another trader, even if untrue and the cause of loss to the other trader, gives no cause of action. An allegation that such statement was made maliciously could not convert a statement *prima facie* lawful into one *prima facie* unlawful; and proof of special damage would be of no avail (*Hubbuck & Sons v. Wilkinson*, (1899) 1 Q.B. 86).

Publication of placards and circulars containing false statements injurious to trade can be restrained by injunction (*Collard v. Marshall*, (1892) 1 Ch. 571).

W, proprietor of V's food for infants, &c., brought from M and sold to his customers M's infants' food. W was in the habit of affixing to the wrappers on M's food a label stating that V's food was far more nutritious and healthful than any other. Held, that W's conduct did not amount to a trade libel, but was merely a puff by a rival trader (*White v. Mellin*, *sup.*).

### 3. *Malicious Prosecution.*

Malicious prosecution is the malicious institution against another of unsuccessful criminal, or bankruptcy, or liquidation proceedings, without reasonable or probable cause (*Churchill v. Siggers*, 3 E. & B. 973). It is not a wrongful act for any person, who honestly believes that he has reasonable and probable cause, though he has not in fact, to put the criminal law in motion against another; but if to the absence of such reasonable and probable cause a malicious motive operating upon the mind of such prosecutor is added, that which would have been a rightful (in the sense of a justifiable) act if done without malice becomes with malice wrongful and actionable. If when he instituted criminal proceedings the prosecutor knew he had no reasonable ground for the steps he was taking, the definition of malice given in *Bromage v. Prosser* (4 B. & C.

247), *viz.*, 'wrongful act done intentionally without just cause or excuse'—would distinctly apply, and no further proof of malice is required; but if he really believed he had such reasonable cause, although in fact he had it not, and was actuated by such belief alone, but also by personal spite or a desire to bring about the imprisonment of or other harm to the accused, or to accomplish some other sinister object of his own, that personal enmity or sinister motive would be quite sufficient to establish the malice required by law to complete a cause of action (per Lord Brampton in *Quinn v. Leathem*, (1901) A. C. 524).

In an action for malicious prosecution the plaintiff has to prove—

1. That he was prosecuted by the defendant before a judicial officer.

2. That he was innocent and his innocence was pronounced by the tribunal before which the accusation was made, or in other words, that the proceedings terminated in his favour (*Abrath v. N. E. Ry.*, 11 Q. B. D. 455).

3. That there was no reasonable or probable cause for the prosecution (*ibid*).

4. That the proceedings of which he complains were initiated in a malicious spirit, that is, from an indirect improper motive, and not in furtherance of justice (*ibid*); and

5. That he has suffered in person, reputation, or pocket, by the prosecution.

If the plaintiff fails to prove any of these five factors his case will also fail.

1. **Prosecution by defendant.**—The prosecution must have been instituted by the defendant against the plaintiff, and not merely by the authorities on facts furnished by the defendant. Thus, if a person *bona fide* lays before a Magistrate a state of facts, without making a specific charge of crime, and the Magistrate erroneously treats the

matter as a felony, when it is in reality only a civil injury, and issues his warrant for the apprehension of the plaintiff, the defendant who has complained to the Magistrate is not responsible for the mistake. For he has not instituted the prosecution, but the Magistrate (*Wyatt v. White*, 29 L. J. Ex. 193; *Cooper v. Booth*, 3 Esp. 144—*Underhill*). But it is no excuse for the defendant that he instituted the prosecution under the order of a Court, if the Court was moved by the defendant's false evidence, though not at his request, to give the order, and if the proceedings in the prosecution involved the repetition of the same falsehood. For otherwise the defendant would be allowed to take advantage of his own fraud upon the Court which ordered the prosecution (*Fitz John v. Mackinder*, 9 C. B. N. S. 505). It is no answer that the accuser was bound over, by recognizance, to prosecute and give evidence, if that was merely the result of the prior malicious proceedings originated by him (*Debois v. Keats*, 11 Ad. & E. 332).

No action will lie for a civil action brought maliciously and without reasonable and probable cause (*Quartz Hill Mining Co. v. Eyre*, 11 Q. B. D. 674).

Plaintiff, who was defendant's servant, lent a fellow-servant two pairs of horse-clipping machines, and took them away again when the other had done with them. The defendant had seen them lying about, and supposing they were his, and missing them, he said to a police man, "I have had stolen from me two pairs of clippers, and they were last seen in the possession of Danby." The police man without further instructions, searched Danby's house, and charged him with felony. The defendant was called as a witness, and gave evidence for the prosecution, both before the Justices and at the trial which ensued. It was held that this did not amount to a prosecution by the defendant (*Danby v. Beardsley*, 43 L. T. 603). It is no prosecution to write a letter to a Superintendent of Police stating that the plaintiff has committed a murder, in consequence of which the police attempt, but in vain, to arrest the plaintiff (*Harris v. Warre*, 4 C. P. D. 125). Defendant went before a Justice, and made a statement from which the Judge's clerk drew the information, and upon the plaintiff appearing, and being examined, the charge was dismissed, the plaintiff was non-suited in an action.

for malicious prosecution (*Cohen v. Morgan*, 6 D. & R. 8). Defendant, having by means of a search-warrant, discovered some casks belonging to him in the house of some one else, swore an information stating this fact, but not making any direct charge against the plaintiff or saying anything which amounted to a charge. The Magistrate thereupon issued a warrant, and in an action for malicious prosecution, Lord Eldon non-suited, saying that the defendant was not responsible if the Magistrate erroneously thought that the facts sworn amounted to a charge of felony (*Leigh v. Webb*, 3 Esp. 164).

2. **Innocence of plaintiff.**—It must be shown that the proceedings terminated in favour of the plaintiff, if from their nature they are capable of such a termination (*Taylor v. Ford*, 29 L. T. 392). The plaintiff need not prove an acquittal, for a prosecution may be determined in various ways (2 Selw. N. P. 1072). If the proceedings are in their nature incapable of terminating in the plaintiff's favour, *e. g.*, the malicious exhibition of articles of the peace (*Steward v. Gromett*, 7 C. B. N. S. 191), this need not be proved.

The single *exception* to the rule that the prosecution must have terminated favourably to the plaintiff is that it does not apply where the proceedings, in respect of which the action is brought, are *ex parte*, and must of necessity terminate unfavourably to the plaintiff (*Stewart v. Gromett*, 7 C. B. N. S. 191).

3. **Reasonable and probable cause** is an honest belief in the guilt of the accused based on a full conviction, founded upon reasonable grounds, of the existence of a state of circumstances which, assuming them to be true, would reasonably lead any ordinarily prudent and cautious man, placed in the position of the accuser, to the conclusion that the person charged was probably guilty of the crime imputed. There must be (1) an honest belief of the accuser in the guilt of the accused; (2) such belief must be based on an honest conviction of the existence of the circumstances which led the accuser to that conclusion; (3) such secondly mentioned belief must be based upon



reasonable grounds, *i. e.*, such grounds as would lead any fairly cautious man in the defendant's situation so to believe; (4) the circumstances so believed and relied on by the accuser must be such as amount to reasonable ground for belief in the guilt of the accused (*Hicks v. Faulkner*, 8 Q. B. D. 167; *Abrath v. N. E. Ry.*, *sup.*; *Broad v. Ham*, 5 Bing. N. C. 728).

The onus of proving the absence of reasonable and probable cause for the prosecution rests on the plaintiff (*Lister v. Perryman*, L. R. 4 H. L. 521; *Abrath v. N. E. Ry.*, 11 App. Cas. 247).

The existence of reasonable and probable cause does not avail if the prosecutor prosecuted in ignorance of it (*Delegal v. Highley*, 3 Bing. N. C. 950). The dismissal of a prosecution does not create any presumption of the absence of reasonable and probable cause (*Byrne v. Moore*, 5 Taunt. 187; *Mitchell v. Jenkins*, 5 B. & Ald. 594).

The opinion of counsel as to the propriety of instituting a prosecution, will not excuse the defendant if the charge was in fact unreasonable and improbable (*Hewlett v. Cruchley*, 5 Taunt, 283).

What is reasonable and probable cause should be determined by the Judge and not be left to the jury (*Allmond v. Muirhead*, 13 T. L. R. 12).

*Leading cases.*—*Lister v. Perryman*; *Abrath v. N. E. Ry.*

4. **Malicious spirit.**—The plaintiff must prove that the defendant was influenced by 'malice in fact' in beginning or continuing the prosecution (*Purcell v. Macnamara*, 9 East 361). The malice here spoken of is 'malice in fact' (*malus animus*), indicating that the party was actuated either by spite or ill-will towards an individual, or by indirect or improper motives, though these may be wholly unconnected with any uncharitable feeling towards any

body (*Hicks v. Faulkner*, 8 Q. B. D. 175). It is "a wish to injure the party rather than to vindicate the law" (*Stephen H.*). Any motive other than that of simply instituting a prosecution for the purpose of bringing a person to justice, is a malicious motive on the part of the person who acts in that way (*Stevens v. Midland Ry.*, 10 Ex. D. 356).

Malice is generally implied upon proof of absence of reasonable and probable cause for instituting the prosecution complained of (*Johnston v. Sutton*, 1 T. R. 544). But the absence of reasonable and probable cause is not *per se* evidence of malice, and a finding that the defendant honestly believed in the case is conclusive against the plaintiff's right of action (*Brown v. Hawkes*, (1891) 2 Q. B. 718). Conversely, the most express malice will not give a cause of action if reasonable and probable cause existed (*Willans v. Taylor*, 6 Bing. 183; *Anonymous*, 6 M. H. C. 73), nor can the absence of the latter be inferred from the existence of malice (*Incedon v. Barry*, 1 Camp. 203; *Turner v. Ambler*, 10 Q. B. 252; *Hailes v. Marks*, 7 H. & N. 56). A prosecution, though at the outset not malicious, may nevertheless become malicious in any of the stages through which it has to pass, if the prosecutor, having acquired positive knowledge of the innocence of the accused, perseveres *malo animo* in the prosecution with the intention of procuring *per nefas* a conviction (*Fitz John v. Mackinder*, 9 C. B. N. S. 505). But where the defendant has honestly and *bona fide* instituted the prosecution, he is not liable, although owing to a defective memory he has wrongly accused the plaintiff (*Hicks v. Faulkner*, 8 Q. B. D. 167).

5. **Plaintiff has suffered.**—It is necessary to show some damage resulting to the plaintiff from the prosecution complained of (*Byne v. Moore*, 5 Taunt. 187). The damage need not necessarily be pecuniary. "There are three sorts

of damages resulting from a malicious and unfounded indictment, any of which would be sufficient to support an action : (1) the damage to a man's fame, as if the matter whereof he is accused is scandalous : (2) where a man is put in danger to lose his life, limb, or liberty : (3) the damage to a man's property, as where he is forced to expend his money in necessary charges to acquit himself of the crime of which he is accused " (per Holt, C. J., in *Savile v. Roberts*, 1 Ld. Raym. 378). Here again, as in slander, the damages must be the reasonable and probable result of the malicious prosecution, and not too remote.

*Indian law.*—In a leading case the Privy Council has laid down that a plaintiff in a suit for malicious prosecution would have to prove :—

(1). That defendant was the prosecutor in the criminal proceedings against him ;

(2). That the defendant was actuated by malice ;

(3). That the defendant's proceeding was without any reasonable or probable cause (*Baboo Ganesh Dutt v. Mugneeram*, 11 B. L. R. 321 ; *Pestonjee M. Mody v. Queen Insurance Co.*, 2 Bom. L. R. 938 ; 25 Bom. 332 ; *Umrao v. Jaisukh*, 2 A. W. N. 83 ; *Ganesh Prasad v. Mahip Rai*, 5 A. W. N. 175 ; *Swami Nayadu v. Subramania*, 2 M. H. C. 158 ; *Dunne v. Legge*, 1 Agra 38 ; *Moonee v. Mun. Commis. of Madras*, 8 M. H. C. 151 ; *Gaur Hari Das v. Hayagrüb*, 6 B. L. R. 371 ; 14 W. R. 425 ; *Nowcouree v. Birmomoyee*, 3 W. R. 169).

The plaintiff must also show that he was innocent of the charge brought against him (*Harish Chunder v. Nishi Kanta*, 28 Cal. 591 ; *Syama Charan v. Jhatoo*, 6 C. W. N. 298).

(1). No action is maintainable for damages occasioned by a *civil* action eventhough brought maliciously and without reasonable and probable cause (*Pranshankar v.*

*Govindlal*, 1 Bom. 467 ; *Abdul Samad v. Rahmatulla*, P. R. 162 of 1889).

(2). " Malice " is not to be considered in the sense of spite or hatred against an individual , but of *malus animus*, and as denoting that the party is actuated by improper and indirect motives ( *Bhim Sen v. Sita Ram*, 24 All. 363). There must be something more of the nature of an indirect or sinister motive for the prosecution than the mere absence of reasonable and probable cause ( *Munhordas v. Goculdas*, 4 Bom. L. R. 560). The mere absence of reasonable and probable cause does not of itself justify the conclusion as a matter of law that an act is malicious. It is not identical with malice, but malice may, having regard to the circumstances of the case, be inferred from it ( *Bhim Sen v. Sita Ram*, *sup.* ; *Ramaya v. Sivayya*, 24 Mad. 549 *Hall v. Venkatakrishna*, 13 Mad. 394 ; *Gajpathi Rau v. Narsing Rau*, 6 M. H. C. 85 ; *Rai Jung Bahadur v. Rai Gudor*, 1 C. W. N. 537). Malice is not to be inferred merely from the acquittal of the plaintiff ( *Roshan v. Nabin*, 6 B. L. R. 377n, 12 W. R. 402). It must be borne in mind that the term ' malice in law ' or ' legal malice ' does not mean that the law will imply malice when no malice existed, but that, when the facts are proved which give rise to a presumption that malice existed, the Court may infer there was malice, that is, that the defendant acted from some other motive than an honest desire to bring a man whom he " believed to have offended against the criminal law to justice " ( *Abrath v. N. E. Ry.*, 11 Q. B. D. 440), or as it was expressed by the Master of the Rolls (*ib.* 449) " with intention which was wrongful in point of fact. " The presumption appears to be one of the class which falls under s. 114 of the Evidence Act (per Barkley, J., in *Maya Mal v. Madho Mal*, P. R. 40 of 1884).

If a prosecution is not malicious 'or groundless no suit

for injury or loss thereby sustained by a person can be brought (*Kishoree Lall v. Enaeth Hossein*, 1 N. W. P. 11).

(3). "Reasonable and probable cause" may be defined to be an honest belief in the guilt of the accused, based upon a full conviction founded upon reasonable grounds of the existence of a state of circumstances which, assuming them to be true, would reasonably lead any ordinarily prudent and cautious man, placed in the position of the accuser, to the conclusion that the person charged was probably guilty of the crime imputed (*Bhim Sen v. Sita Ram*, 24 All. 363; *Ma Aw v. Mounng San*, 6 Burma L. R. 153).

The test of reasonable and probable cause is not what impression the circumstances would make on the mind of a lawyer but whether the circumstances warranted a discreet man in instituting and following up the proceedings (*Munhordas v. Goculdas*, 4 Bom. L. R. 560; *Yachendralu v. Narayensami*, 9 M. L. J. R. 110; *Maya Mal v. Madho Mal*, P. R. 40 of 1884). The test which has received the most approbation is partly abstract and partly concrete. Was it reasonable and probable cause for any discreet man? Was it so to the maker of the charge? (per Holloway, C. J., in *Goday Narrain v. Sri Ankitam Venkata*, 6 M. H. C. 87). The question to be determined is, had the defendant at the time of instituting the criminal proceedings against the plaintiff such grounds for his action as might fairly lead him as an ordinarily cautious and discreet man, to believe that the plaintiff had committed the offence? (*Dwarka Das v. Hari Har*, 4 A. W. N. 1). There can be no question of reasonable and probable cause where the charge was one which must have been true or false to the defendant's knowledge, and in which there could be no mistake on his part. The bringing of a charge false to the knowledge of the prosecutor

imports in law malice sufficient to support a civil action (*Hira Lal v. Bandhu*, 9 A. W. N. 189 ; *Sukhdeo v. Bhojan*, 10 A. W. N. 243).

Where the charge was false to the knowledge of the defendant, the omission to allege expressly malice and the absence of reasonable and probable cause is no good ground of objection to the hearing of the suit (*Ramasami v. Rama*, 3 M. H. C. 372). If the charge was found to be false, the onus would be on the defendant to show that he had reasonable and sufficient cause for making it ; on his failure to show any such cause, malice may be inferred (*Biswanath v. Ramdhan*, 6 B. L. R. 375<sup>n</sup> ; 11 W. R. 42 ; *Vengama v. Raghava*, 2 M. H. C. 291 ; *Gunga Pershad v. Ramphal Sahoo*, 20 W. R. 177 ; *Weatherall v. Dillon*, 6 N. W. P. 200 ; *Anundloll Doss v. Jointee Chunder*, 1 Ind. Jur. N. S. 93).

The fact that the plaintiff was acquitted, is not *prima facie* evidence that the charge was unreasonable and false (*Nund Kishore v. Kishen Dyal*, P. R. 4 of 1868 ; *Mosalli v. Habib Khan*, P. R. 19 of 1879 ; *Pestonji M. Modi v. Queen Insurance Co.*, 2 Bom. L. R. 938 ; 25 Bom. 332).

The fact that a plaintiff has been convicted by a competent Court, although he may subsequently have been acquitted on appeal, is evidence, if un rebutted, of the strongest possible character against the plaintiff's necessary plea of want of reasonable and probable cause (*Jadubar Singh v. Sheo Saran*, 21 All. 26 ; *Parimi v. Bellamkonda*, 3 M. H. C. 238 ; *Ramayya v. Sivayya*, 24 Mad. 549 ; *Shivram v. Dhondur*, (1886) P. J. 9 ; *Doongrussee v. Gridharee*, 10 W. R. 439 ; *Koibatoollah v. Motee*, 13 W. R. 276 ; *Gunga Ram v. Hoolasee*, 2 N. W. P. 88). An accusation which has been held by a criminal Court to be unfounded is sufficient *prima facie* evidence that the

accusation was maliciously brought (*Heera Chand v. Banee Madhub*, 6 W. R. 29).

A plaintiff must prove in a civil Court that there was no reasonable cause for bringing the accusation ; the proceedings in a criminal Court are not evidence in the civil Court (*Aghorenath Roy v. Radhika Pershad*, 14 W. R. 339). But the judgment of a criminal Court is admissible in evidence (*Ram Jung Bahadur v. Rai Gudor*, 1 C. W. N. 537 ; *Firozshah v. Woutersz*, P. R. 60 of 1902).

The question of reasonable and probable cause is in England, where such cases are tried by a Judge with a Jury, a question for the Judge and not for the jury ; but in India, where there is no jury, the Judge becomes himself the Judge of the law and the facts. And the determination of reasonable and probable cause is a question of fact to be determined by one and the same person (*Pestonji M. Mody v. Queen Insurance Co.*, *sup* ; *Harish Chunder v. Nishi Kanta*, 28 Cal. 591 ; *Himatkhan v. Himatkhan*, (1872) P. J. No. 168).

The discharge of an accused by a Magistrate is such a termination of the prosecution as entitles the accused to maintain an action for malicious prosecution (*Venu v. Coorya*, 6 Bom. 376). Where defendant instituted criminal proceedings before the Police and the Police after investigation prosecuted plaintiff, it was held that no action lay against the defendant (*Narasinga v. Muthaya*, 12 M. L. J. R. 389 ; *Trilochana v. Brojo Patro*, 12 M. L. J. R. 349). A Police Constable, who is in effect the prosecutor and not acting merely in his official capacity, who does not take reasonable care to inform himself of the truth of the case, and who does not honestly believe in the charge preferred by him, and is actuated by an indirect motive in preferring it, is liable in a suit for damages for malicious prosecution (*Minakshisundrum v. Ayyathorai*, 18 Mad. 136).

A charge of assault against the plaintiff was dismissed but it appeared that there was 'criminal intimidation' on his part although he was not charged with that offence by the defendant. Held, in an action for damages for malicious prosecution, that he would not be entitled to any damages, as no malice or dishonest motive could be imputed to the defendant in bringing the charge of assault (*Madhu Lal v. Sahai Pande*, 27 Cal. 532). In a

suit for damages for malicious prosecution, plaintiff, with the object of proving the falsity of the charge which defendant had preferred against him, filed the order of the Magistrate dismissing the charge. Held, that this was insufficient, the onus being on the plaintiff to prove that he was innocent and that his innocence had been pronounced by the tribunal before which the accusation had been made (*Nalliappa v. Kailappa*, 24 Mad. 59). D lodged a complaint before a Magistrate that he had been assaulted and severely beaten by four persons whom he named. He subsequently added the name of a fifth person as one of his assailants. When required to make a statement upon oath in support of his complaint, he stated *inter alia*, that in the course of the assault one M came from behind and called out "beat." Thereupon the Magistrate issued a warrant against M also as well as against the persons named in the complaint. M was acquitted, and thereafter brought a suit for damages for malicious prosecution against the complainant. Held, that the plaintiff had never been prosecuted by the complainant, but that his prosecution was due to the action of the Court *suo motu*, and that the plaintiff had no cause of action against the defendant (*Dudhnath v. Mathura*, 24 All. 317). Proceedings taken by a defendant in applying to a criminal Court for sanction to prosecute the plaintiff, and in which sanction was not allowed, were held not to afford a sufficient cause of action for a suit for malicious prosecution (*Ezid Baksh v. Harsukh*, 9 All. 59). Where the charge was brought by a defendant upon untrue facts which were entirely within his own knowledge and the plaintiff was convicted by the Courts upon what was held by the Chief Court (while holding the plaintiff's action also to have been actuated solely by malice) to be a wrong view of the law as applied to the facts found. Held, that the defendant had no reasonable and probable cause for the charge, which was malicious in the legal sense, and that the plaintiff's action having been also actuated solely by malice, the measure of damages awarded should be under such circumstances of the smallest possible dimension (*Badri Das v. Nathu Mal*, P. R. 112 of 1901). Where a stamp-collector sent through the post under a registered cover certain stamps and on being informed that they have not safely reached their destination reported the matter to the Police and related all the circumstances within his knowledge, wherein no specific charge was made against the plaintiff, and the Police, after searching another man named by the defendant, also searched the plaintiff, who was the Registration Clerk of the Post Office in which the packet had been registered, and arrested and sent him up for trial. Held, that there was reasonable and probable cause for such action as was taken by defendant and that no malice in law had been shown on the part of the defendant to entitle plaintiff to a decree (*Ferozshah v. Woutersz*, P. R. 60 of 1902).

*Leading case.*—**Baboo Ganesh Dutt v. Mugneeram.**



**Malicious civil proceedings and Malicious prosecution distinguished.**—There is a difference between, maliciously, and without probable cause, instituting civil proceedings, and the similarly putting the criminal law in motion to the damage of another. From the former the only liability is what arises from being charged with costs, or from any special provisions regarding vexatious suits. In contemplation of law the defendant who is unreasonably sued is sufficiently indemnified by a judgment in his favour which gives him his costs against the plaintiff and therefore even if malice be proved, an action does not lie for instituting civil proceedings (*Quartz Hill Gold Mining Co. v. Eyre*, 11 Q. B. D. 674). The one is the exercise of the private right of action, the other is an abuse, by a private person, of the criminal law.

*Indian law*—As shown above the rule of English law is that the malicious assertion of a legal right is not actionable. But the rule in India is different. According to Indian law, an action will lie for the improper issue of mesne and other legal process (*vide* Civil Procedure Code (Act XIV of 1882) ss. 491, 497). Proof of legal, not actual, malice, and of sufference of ‘some collateral wrong’ is essential in such cases (*Gontiere v. Robert*, 2 N. W. P. 353 ; *Dharmo Narayan v. Shrimoti Dasi*, 18 W. R. 440).

‘False imprisonment’ and ‘Malicious prosecution’ distinguished.—(1). ‘False imprisonment’ is wrongfully restraining the personal liberty of the plaintiff : ‘malicious prosecution’ is wrongfully setting the criminal law in motion against him. Restraining the personal liberty of another person is *prima facie* a wrongful act. Setting the criminal law in motion is *prima facie* a thing which any person has a right to do, and it is necessary for a plaintiff to show that in the particular instance it was done wrongfully, *i. e.*, maliciously and without reasonable cause, before he can recover for it (*Stephen H.*).

The distinction between 'false imprisonment' and 'malicious prosecution' is well illustrated by the case where parties being before a Magistrate, one makes a charge against another, whereupon the Magistrate orders the person charged to be taken into custody and detained until the matter can be investigated. The party making the charge is not liable to an action for false imprisonment, because he does not set a ministerial officer in motion, but a judicial officer. The opinion and judgment of a judicial officer are interposed between the charge and the imprisonment (per Willes, J., in *Austin v. Dowling*, L. R. 5 C. P. 540). Thus the question is, does the defendant set a ministerial or a judicial officer in motion? If the former, he may be liable for false imprisonment; if the latter, for malicious prosecution.

(2). In 'false imprisonment', the onus lies on the defendant to plead and prove affirmatively the existence of reasonable cause as his justification, whereas in an action for malicious prosecution the plaintiff must allege and prove affirmatively its non-existence (*Hicks v. Faulkner*, 8 Q. B. D. 167).

**Damages.**—A successful plaintiff in an action for malicious prosecution is entitled to recover damages for the costs of his defence, which used to be considered the main ground, and was probably the original ground, of the action, and for the indignity and injury to his fame or credit caused by the prosecution (*Stephen II.*).

In an action for malicious prosecution, the damages may be a matter of calculation, as where they consist of the necessary charges to which a man has been put to procure his discharge, or in defending himself against the prosecution, including the fee paid by him to his pleader (*Subba Rau v. Virappa*, 5 Mad. 162; *Anundlall v. Jointee Chunder*, 1 Ind. Jur. N. S. 93; *Shama Churn v.*

*Beharilal*, 14 W. R. 443; *Bunnomali v. Hurrydass*, 11 C. L. R. 265). The nature and extent of the damage resulting to the plaintiff from the proceedings of the defendant may also be shown. The damages are purely discretionary where they accrue from the scandalous nature of the prosecution (*Leith v. Pope*, 2 W. Bl. 1326). A plaintiff's feeling may be taken into account in assessing damages for a malicious prosecution (*Haro Lal v. Haro Chandra*, 12 W. R. 89). When a plaintiff has prosecuted the defendant in a criminal Court and the latter has been convicted, he cannot sue the defendant in the civil Court for the expenses incurred by him in prosecuting the defendant in the criminal Court (*Fazul Imam v. Fazal Rasul*, 12 All. 166).

Damages are given on two grounds: (1) on the ground of a *solatium* for injury to the feelings of the party prosecuted; (2) as a reimbursement for legitimate expenses incurred by him in his defence (*Rai Jung Bahadur v. Rai Gudor*, 1 C. W. N. 537; *Bunnomali v. Hurrydass*, 8 Cal. 710). The expense of counsel is not a proper element in the calculation of damages awardable to a successful plaintiff (*Goday v. Ankitam*, 6 M. H. C. 85). But in a later case of the same Court it is said that the fee paid by plaintiff to his pleader for the purpose of his defence before the criminal Court is an element to be considered in assessing the damages suffered (*Gajapathi v. Narsing*, 5 Mad. 162).

#### 4. *Malicious arrest.*

Malicious arrest is wilfully putting the law in motion to effect the arrest of another under civil process without reasonable and probable cause. It is not actionable unless it involves interference with liberty (*Spence v. Jacob*, M.

& M. 180 ; *George v. Radford*, *ibid*, 245 ; *Webb v. Hill*, *ibid*, 253).

A suit to recover damages on account of injuries caused by an arrest in accordance with a decree of a competent Court can only be maintained under special circumstances. The plaintiff must show—

(1) that the original action, out of which the alleged injury arose, was decided in his favour ;

(2) that the arrest was procured maliciously and without reasonable and probable cause by the defendant ;

(3) that the injury or damage sustained was something other than an injury which has been, or might have been, compensated for by an award of the costs of suit, *i. e.*, he has suffered some collateral wrong.

Where a plaintiff must show an absence of reasonable and probable cause, malice alone is not sufficient to entitle him to a verdict (*Anonymous*, 5 M. H. C. 24 ; *Willans v. Taylor*, 6 Bing. 186).

The foundation of an action for malicious arrest is, that the party has obtained an order or authority from a Judge to make an arrest, by imposing some false statement upon the Judge, knowingly and designedly, and for the purpose of obtaining some undue advantage, or by stating certain facts as being true within his knowledge, when he knew nothing about them, or his belief in the truth of a particular statement, when he had no reasonable or probable cause for his belief (*Gibbons v. Alison*, 3 C. B. 185 ; *Daniels v. Fielding*, 16 M. & W. 206). If a person sets the process of a Court in motion and a wrong person is arrested, he is only responsible if he obtained such process fraudulently and improperly (*Bheema Charlu v. Danti Murti*, 8 M. H. C. 40). If a party truly states facts, and the Judge thereupon does an act which is erroneous, the party is not liable ; for the damage then arises from the

mistake of the Judge and not the false statement of the party (*Farley v. Danks*, 4 E. & B. 499).

Where the party submits to the process, or to the commands of an officer intimating that he is in custody, there is a perfect arrest. Actual contact is not necessary to constitute an arrest (*Grainger v. Hill*, 4 Bing. N. C. 212).

**Damages.**—In awarding damages the following facts may be taken into consideration. The plaintiff, by reason of the arrest, was prevented from attending to his business, was injured in his credit (*Jennings v. Florence* 26 L. J. C. P. 277) and was put to and incurred divers costs and expenses for his maintenance during the detention, and in obtaining his discharge (*Churchill v. Eiggus*, 3 E. & B. 929.) The costs and expenses of procuring a discharge from an arrest are limited to those which have been taxed or recognised by the Court ; and extra costs, though actually incurred, are not recoverable (*Sinclair v. Eldred*, 4 Taunt. 7).

### 5. *Maintenance.*

Maintenance is a malicious assistance, by money or otherwise, preferred by a third person to either party to a suit to enable him to prosecute or defend it (*Underhill*). When a person agrees to maintain a suit in which he has no interest, the proceeding is known as *maintenance*, and where a person bargains for a share of the result to be ultimately decreed in a suit in consideration of assisting in its maintenance it is styled *champerty* (*Sprye v. Porter*, 20 L. J. Q. B. 64). They tend to encourage litigation which is not *bona fide* but speculative. The law of maintenance is confined to cases where a man improperly and for the purpose of stirring up litigation and strife encourages others to bring actions or to make defences which they have no right to make. No encouragement should be given to litigation by the introduction of parties to enforce

those rights which others are not disposed to enforce (per Lord Abinger, C. B., in *Prosser v. Edmonds*, 1 Y. & C. 481).

No action will lie for improperly promoting a civil action in the name of a third person, unless it is proved to have been done (1) maliciously, (2) without reasonable and probable cause, and (3) there is also legal damage (*Cotterell v. Jones*, 11 C. B. 730). It would seem that even where there is no directly malicious motive inducing the party to sustain the suit, yet if his acts tend to promote unnecessary litigation malice will be implied (*Bradlaugh v. Newdegate*, 11 Q. B. D. 1). But it may be rebutted by showing (1) that the maintainer had a common interest in the action with the party maintained (*Guy v. Churchill*, 40 Ch. D. 481), *e.g.*, a master for a servant or a servant for a master, an heir, a brother, a son-in-law, a brother-in-law, a fellow-commoner defending right of common, or a landlord defending his tenant in a suit for title. The interest spoken of is an actual valuable interest in the result of the suit itself, either present, or contingent, or future, or the interest which consanguinity or affinity to the suitor gives to the man who aids him, or the interest arising from the connection of the parties, *e. g.*, as master and servant, or that which charity and compassion gives a man in behalf of a poor man, who but for the aid of his rich helper could not assert his rights, or would be oppressed and overborne in his endeavour to maintain them (per Lord Coleridge, C. J., in *Bradlaugh v. Newdegate*, 11 Q. B. D. 11). (2) That the maintainer was actuated by motives of charity, *bona fide* believing that the person maintained was a poor man oppressed by a rich one (*Haris v. Brisco*, 17 Q. B. D. 504).

Plaintiff having sat and voted as a Member of Parliament without having made and subscribed the oath appointed by a statute, defendant, also a Member of Parliament, procured C to sue the plaintiff for the penalty imposed by that statute for contravention thereof. C was a person of insufficient means to pay the costs in the event of the action being unsuccessful. The defendant

gave to C a bond of indemnity against all costs and expenses he might incur in consequence of the action. Held, that the defendant and C had no common interest in the result of the action for the penalty, that the conduct of the defendant in respect of such action amounted to maintenance and that the action for maintenance was maintainable (*Bradlaugh v. Newdegate*, 11 Q. B. D. 1). H being interested in the success of certain electrical appliances employed T to write a report upon them. A published an article in which H, T and the appliances were attacked. At the instigation of H who paid the expenses, T brought an action for libel against A. Held, that there was no such community of interest between T and H as to be an answer to an action for maintenance brought by A against H (*Alabaster v. Harness*, (1895) 1 Q. B. 339). Where during the pendency of an action, the plaintiffs became bankrupt, and the trustee in bankruptcy assigned the right of action to F, with power to continue it, on the terms that if F was successful he should take three-fourths of the net result, and that the remaining one-fourth should be paid to the trustee in bankruptcy, and it further appeared that F was in reality trustee for himself and certain other creditors of the bankrupt, it was held that the transaction was lawful. For F and the trustee in bankruptcy had a common interest in the subject matter of the action, and so had the other creditors for whom F was trustee (*Guy v. Churchill*, 40 Ch. D. 481).

*Indian law.*—The English law of maintenance and champerty is not in force as specific law in India either in the mofussil or in the Presidency towns (*Ram Coomar v. Chunder Canto*, 4 I. A. 237; 2 Cal. 233; *Mayor of Lyons v. East India Co.*, 1 M. I. A. 176). A fair agreement to supply money to a suit or to carry on a suit, in consideration of the lender's having a share of the property sued for, if recovered, is not to be regarded as necessarily opposed to public policy, or merely, on this ground, void. But in agreements of this kind the questions are: (a) whether the agreement is extortionate and unconscionable, so as to be inequitable against the borrower; or (b) whether the agreement has been made, not with the *bona fide* object of assisting a claim, believed to be just, and of obtaining reasonable compensation therefor, but for improper objects, as for the purpose of gambling in litigation, or of injuring others, so as to be, for these reasons, contrary to public policy. In either of these cases, effect is not to

be given to the agreement (*Raja Mohkam v. Raja Rup Singh*, 15 All. 352, P. C.; *Raghunath v. Nil Kanth*, 20 Cal. 843, P. C.; *Dhallu Missar v. Jiwan Singh*, P. R. 79 of 1894).

To make such agreements void "there must be something against good policy and justice, something tending to promote unnecessary litigation, something that in a legal sense is immoral, and to the constitution of which a bad motive in the same sense is necessary" (*Fischer v. Kamala Naicker*, 8 M. I. A. 187; *Gholam v. Walidad*, P. R. 70 of 1870). Indian Courts will not sanction every description of maintenance. "Administering, as they are bound to administer, justice according to the broad principles of equity and good conscience, those Courts will consider whether the transaction is merely the acquisition of an interest in the subject of litigation *bona fide* entered into, or whether it is an unfair or illegitimate transaction got up for the purpose merely of spoil, or of litigation disturbing the peace of families, and carried on from a corrupt or other improper motive" (*Chedambara v. Renja Krishna*, 13 B. L. R. 526; *Virabhadra v. Guruvenkata*, 22 Mad. 312; *Gopal v. Gungaram*, 14 Bom. 72; *Ahmedbhoy v. Vulleebhoy*, 8 Bom. 323; *Siva Ramayya v. Ellamma*, 9 M. L. J. R. 17; *Chunilal v. Parbhudas*, (1897) P. J. 258).

### 6. Conspiracy.

A conspiracy is an unlawful combination of two or more persons to do that which is contrary to law, or to do that which is wrongful and harmful towards another person, or to carry out an object not in itself unlawful by unlawful means (per Lord Brampton, in *Quinn v. Leatham*, (1901) A. C. 528). An actionable conspiracy exists when a number of men combine either to do an unlawful act, or to do a lawful act by unlawful means (per Bigham, J., in *Glamorgan Coal Co. v. South Wales Miners Federation*, (1903)



1 K. B. 136; *Mulcahy v. R.*, L. R. 3 H. L. 317). It is not necessary, in order to constitute a conspiracy, that the acts agreed to be done should be acts which if done should be criminal. It is enough if the acts agreed to be done, although not criminal, are wrongful, *i. e.*, amount to a civil wrong (per Cockburn, C. J., in *R. v. Warburton*, L. R. 1 C. C. 276).

The essential elements, whether of a criminal or of an actionable conspiracy are the same, though to sustain an action special damage must be proved (per Lord Brampton in *Quinn v. Leathem*, *sup.* 529; *Barber v. Lesiter*, 7 C. B. N. S. 175).

The mere act of conspiracy is not the subject of a civil action (though it may be of an indictment). There must be some act in pursuance of the conspiracy, and there must be actual damage to the plaintiff. It is the damage wrongfully done, and not the conspiracy, that is the gist of action on the case for conspiracy. Thus, where several combine to hiss an actor, or to "boycott" a tradesman or merchant, the element of combination is part and parcel of the wrong, since the damage could not have occurred without it. The illegal or malicious combination is then the gist of the wrong. "In all such cases it will be found that there existed either an ultimate object of malice or wrong, or wrongful means of execution involving elements of injury to the public, or at least negating the pursuit of a lawful object" (per Lord Field, in *Mogul Steam S. Co. v. M'Gregor*, (1892) A. C. 52).

No action for a conspiracy lies against persons who act in concert to damage another and do damage him, but who at the same time merely exercise their own rights by lawful means and who infringe no rights of other people. Thus acts done by X and Y, who are acting in concert, solely for the purpose of protecting and extending their

trade and increasing their profits, and which do not involve the employment of any means in themselves unlawful, are not actionable, eventhough these acts cause damage to A. In other words, trade competition carried out to an extreme length is, eventhough it cause damage to A, not actionable, provided that his competitors are acting solely with the lawful object of securing successes in trade and use no unlawful means (*Mogul Steamship case*, (1892) A. C. 40, 44, judgment of Lord Watson ; p. 59, judgment of Lord Han-  
nen ; and (1889) 23 Q. B. D., 613, 614, judgment of Bowen, L. J.).

While combination of different persons in pursuit of a trade object was lawful, although resulting in such injury to others as may be caused by legitimate competition in labour, yet that combination for no such object, but in pursuit merely of a malicious purpose to injure another, would be clearly unlawful (per Lord Shand in *Quinn v. Leathem*, *sup.* 512). Where the acts complained of are in pursuance of a combination or conspiracy to injure or ruin another, and not to advance the parties' own trade interests, and injury has resulted, an action will lie (*ibid*, 513). Hence, it has been unanimously held by the House of Lords in *Quinn v. Leathem* that a combination of two or more, without justification or excuse, to injure a man in his trade by inducing his customers or servants to break their contracts with him or not to deal with him or continue in his employment is, if it results in damage to him, actionable. A person has a right to carry on his own business, as long as he does not break the law, in the way he himself prefers. Hence, it is the legal duty of third persons not to use intimidation or coercion towards him or his customers, with a view to preventing him from carrying on his business in the way he chooses (*Quinn v. Leathem*, 536—38, judgment of Lord Lindley). This

appears to be the central position finally established by the judgment of the House of Lords. The appellants in that case, namely certain trade unionists, were liable to an action, not because their *motive* for exercising their own rights was bad or malicious, but because they were pursuing an *object* which in itself was unlawful, namely, damage to A through the unjustifiable coercion and intimidation of A's customer, N, with, be it added, the further and equally unlawful object of punishing A's servants for not having joined a trade union. This distinction between motive and object may be called a fine one, but it is a real distinction and corresponds with the dictates of common sense. It exactly differentiates the cases in which X and Y make an extreme but lawful use of their own rights whereby damage ensues to A, as in the *Mogul* case or in the case of the *Scottish Co-operative Society v. Glasgow Fleshers Association*, (1898) 35 Sc. L. R. 645, from *Quinn v. Leathem*, where the object was to do damage to A, and this object was to be attained by coercing N, *i. e.*, interfering with N's rights (*L. Q. R.* xviii. 1).

"It has often been debated whether, assuming the existence of a conspiracy to do a wrongful and harmful act towards another and to carry it out by a number of overt acts, no one of which taken singly and alone would, if done by one individual acting alone and apart from any conspiracy, constitute a cause of action, such acts would become unlawful or actionable if done by the conspirators acting jointly or severally in pursuance of their conspiracy, and if by those acts substantial damage was caused to the person against whom the conspiracy was directed : my own opinion is that they would.

"In dealing with the question it must be borne in mind that a conspiracy to do harm to another is, from the moment of its formation, unlawful and criminal, though

not actionable unless damage is the result.

“The overt acts which follow a conspiracy form of themselves no part of the conspiracy : they are only things done to carry out the illicit agreement already formed, and if they are sufficient to accomplish the wrongful object of it, it is immaterial whether singly those acts would have been innocent or wrongful, for they have in their combination brought about the intended mischief, and it is the wilful doing of that mischief, coupled with the resulting damage, which constitutes the cause of action, not of necessity the means by which it was accomplished.

“Much consideration of the matter has led me to be convinced that a number of actions and things not in themselves actionable or unlawful if done separately without conspiracy may, with conspiracy, become dangerous and alarming, just as a grain of gun-powder is harmless but a pound may be highly destructive, or the administration of one grain of a particular drug may be most beneficial as a medicine but administered frequently and in large quantities with a view to harm may be fatal as a poison” (per Lord Brampton in *Quinn v. Leathem*, *sup.* 529, 530).

“That a conspiracy to injure—an oppressive combination—differs widely from an invasion of civil rights by a single individual cannot be doubted” (per Lord Macnaghten, *ibid.*, 511). “It is said that conduct which is not actionable on the part of one person cannot be actionable if it is that of several acting in concert. This may be so where many do no more than one is supposed to do. But numbers may annoy and coerce where one may not. Annoyance and coercion by many may be so intolerable as to become actionable, and produce a result which one alone could not produce” (per Lord Lindley, *ibid.*, 538).

These observations appear to over-rule the view that a conspiracy to do certain acts gives a right of action

only where the acts agreed to be done, and in fact done, would, had they been without preconcert, have involved a civil injury to the plaintiff, for which he would have had a right of action (*Huttley v. Simons*, (1898) 1 Q. B. 181; following *Kearne v. Lloyds*, 26 L. R. Ir. 268).

On the other hand, the judgments in *Quinn v. Leathem*, says a distinguished writer, tend at any rate to diminish the difference between conduct pursued by X and Y in concert and conduct pursued by X when acting without concert with others. True indeed it is that the conduct of X and Y acting in concert may be actionable whilst what may be called the same conduct when pursued by X alone is not actionable. But the reason for this distinction lies apparently far less in the absence or presence of concerted action than in the fact that there are certain kinds of damage which as a rule cannot possibly be inflicted by one person when acting without concert with others. If it should happen that one man, X, could not by means of conspiracy, but through his extensive power and influence, work the same kind of damage to A which can in general be achieved only by the combined efforts of X, Y and Z, it is quite possible that X might be liable to an action.

Lord Lindley says: "It was contended that if what was done in this case had been done by one person only, his conduct would not have been actionable, and that the fact that what was done was effected by many acting in concert makes no difference. One man without others behind him who would obey his orders *could not have done* what these defendants did. One man exercising the same control over others as these defendants could have acted as they did, and, if he had done so, I conceive that he would have committed a wrong towards the plaintiff for which the plaintiff could have maintained an action."

From the main principle, however, of *Quinn v. Leathem*

flow three subordinate conclusions which may be treated as certain, and may be practically as important as the main point decided by the judgment of the House of Lords. These subordinate points may be thus stated :

(1). *Lumley v. Gye*, *Bowen v. Hall* and *Temperton v. Russell* were rightly decided and are good law at any rate to this extent ; that if without legal justification X induces N to break a contract with A, who suffers damage thereby, or if X by means of coercion or molestation or threats thereof compels N to cease dealing with or remaining in the employment of A who is damaged thereby, X is liable to an action by A, and this is so eventhough N, *e. g.*, in ceasing to deal with A, does not break any contract with A.

(2). The term coercion or intimidation includes threats not only of bodily harm but also of serious annoyance and damage (*Quinn v. Leathem*, judgment of Lord Lindley).

(3). The Conspiracy and Protection of Property Act, 1875, s. 3, has nothing to do with civil remedies, and the term 'trade dispute between employers and employed' does not include such a transaction as that with which the Courts were called upon to deal in *Quinn v. Leathem* (*L. Q. R.* xviii. 1)

Plaintiff, being about to become an actor, the defendants, with other persons, maliciously conspired to prevent him from exercising that profession. They, in pursuance of such conspiracy, hired persons to hiss, and who accordingly attended the theatre for that purpose. The plaintiff appeared in character upon the stage, and thereupon the defendants, with other persons, hissed and hooted the plaintiff, so as to compel him to desist from the performance and thereby caused the plaintiff to lose his engagement. Held, that a good cause of action was shown (*Gregory v. Brunswick*, 6 M.& G. 205). A combination between shipowners carrying from the same ports, with the object of keeping freights within their control, effected by allowing a rebate to shippers who ship exclusively on board their ships, by prohibiting their agents, on penalty of removal, from being directly or indirectly interested in ships other than theirs, and by sending to ports where other shipowners are asking for cargo, ships sufficient to lower the freights below the rate under open competition, thereby causing loss to such shipowners, not

being attended by circumstances of dishonesty, intimidation, molestation, or actual malice, is not actionable as a wrong by individuals, as a conspiracy, or as in restraint of trade (*Mogul Steamship Co. v. M'Gregor* (1892) A. C. 25). An action will not lie against persons who, for their own benefit, combine to induce others to refrain from dealing with a particular person (*Boots Cash Chemists v. Grundy*, 16 T. L. R. 457).

Defendants were members of a joint committee of three trade unions. A firm of builders having refused to obey certain rules laid down by the unions with regard to the building operations, the unions sought to compel them to do so, by preventing the supply of building materials to them. They, therefore, requested the plaintiff, who supplied building materials to the firm, to cease to supply them with such materials but the plaintiff refused to do so. Thereupon, with the object of injuring the plaintiff in his business, in order to compel him to comply with such request, the defendants induced persons who had entered into contracts with the plaintiff for the supply of materials, to break their contracts, and not to enter into further contracts with the plaintiff, by threatening that the workman would be withdrawn from their employ. The plaintiff sustained damage in consequence of such breaches of contracts, and of the refusal of such persons to enter into contracts with him. Held, that an action was maintainable by the plaintiff against the defendants for maliciously procuring such breaches of contracts, and also for maliciously conspiring together to injure him by preventing persons from entering into contracts with him (*Temperton v. Russell and others*, (1893) 1 Q. B. 715; *Giblan v. National Amal. Labour's Union &c.* 18 T. L. R. 500).

The respondents were shipwrights employed "for the job" on the repairs to the woodwork of a ship, but were liable to be discharged at any time. Some ironworkers who were employed on the ironwork of the ship objected to the respondents being employed, on the ground that the respondents had previously worked at ironwork on a ship for another firm, the practice of shipwrights working on iron being resisted by trade union of which the ironworkers were members. The appellant, who was a delegate of the union, was sent for by the ironworkers and informed that they intended to leave off working. The appellant informed the employers that unless the respondents were discharged all the ironworkers would be called out or knock off the work (it was doubtful which expression was used); that the employers had no option; that the iron-men were doing their best to put an end to the practice of shipwrights doing ironwork and that wherever the respondents were employed the ironmen would cease work. There was evidence that this was done to punish the respondents for what they had done in the past. The employers, in fear of this threat being carried out which would have stopped their business, discharged the respondents and refused to employ them again. The respondents brought an action against the appellant. Held, that the

appellant had violated no legal right of the respondents, done no unlawful act, and used no unlawful means, in procuring the respondents' dismissal; that his conduct was not actionable however malicious or bad his motive might be (*Allen v. Flood and Taylor*, (1898) A. C. 1).

The plaintiffs were manufacturers of leather bags. The defendants were the secretary and a member of the executive committee of a trade union. The union had ordered a strike against the plaintiffs partly for an increase of wages and partly to put an end to the system of paying some persons by piece work and some by time. The union had picketted the plaintiffs, and had also ordered a strike against another maker who made only for the plaintiffs. The plaintiffs alleged that one letter, written as part of the trade-contest to an employe, amounted to a libel, and that a workman had been induced by the union to break his contract, and that the acts of the plaintiffs in trying to induce people not to enter their employment was malicious. The Court granted an injunction to restrain the defendants from maliciously inducing persons not to enter into the employ of the plaintiffs (*Lyons v. Wilkins* (1899) 1 Ch. 255). The plaintiff entered into a contract by which he was apprenticed to his employers to learn certain work. A friendly society of workmen engaged in similar work protested to the employers against the engagement of the plaintiff as an apprentice, on the ground that it was a breach of one of the rules of the society which the employers had agreed to and signed, and they gave notice that, if the engagement was continued, they would call out the workmen who were working for the employers, and who were all members of the society. In consequence of this threat the employers refused to continue to teach the plaintiff under the terms of the deed of apprenticeship. In an action by him against the society and certain of the officers, it was held that he had a good cause of action to which the previous agreement between the society and the employers was no answer (*Read v. Friendly Society &c.* (1902) 2 K. B. 732). The executive council of a coal miners trade union were authorized by the members to declare a general holiday at any time they might think it necessary for the protection of wages and of the industry generally in order to arrest the downward price of coal. The council subsequently declared a general holiday, without notice to the masters, when all the miners left off work for the day. In doing so, the council acted from an honest desire to forward the interests of the men having been solicited by the men to advise and guide them on the point, and not from a desire to injure the masters, and without any malice towards them. In an action by the masters against the trade union for wrongfully and maliciously inducing the men to break their contracts of service, it was held that the council had lawful justification or excuse for what they did, and that the action was not maintainable (*Glamorgan Coal Co. v. South Wales Miners Federation* (1903) 1 K. B. 136). In a case of intimidation by trades' unionists, an injunction was granted



against issuing placards enjoining workmen not to work for the plaintiff until the dispute between the plaintiff and the trade union was settled, on the ground that the act of such unionists tended to the destruction or deterioration of the plaintiff's property (*Springhead Spinning Co. v. Riley*, L. R. 6 Eq. 551).

*Indian case.*—A mere conspiracy to injure a man without an overt act resulting in the injury does not furnish any cause of action. A conspiracy is not illegal unless it results in an act done which by itself would give a cause of action (*Templeton v. Laurie*, 2 Bom. L. R. 244, 623 ; 25 Bom. 230).

*Leading Case.*—**Mogul Steamship Co. v. McGregor.**

## 6. *Malicious interference with the rights of others.*

(a) **Rights of business, occupation, &c.**—The law recognizes the right of every person to endeavour to acquire property by carrying on any lawful business or occupation; and every interference with the right without lawful excuse is a tort, such as driving the plaintiff's tenants from their holdings by menaces (1 Roll. Abr. 108), or preventing people by the use of threats and intimidation from trading with the plaintiff's vessel in a foreign port (*Tarleton v. McGowley*, Peake 270), or from dealing with the plaintiff's shop, or from sending their children to the plaintiff's school, or placing obstructions and impediments in the way of the exercise of the right of free access to a man's place of business (*Bell v. Midland Ry.*, 10 C. B. N. S. 337).

Where the plaintiff is the owner of a decoy for catching wild fowl, and the defendant wilfully fires off guns near the decoy and frightens wild fowls away from it, he is liable (*Carrington v. Taylor*, 11 East 571).

(b) **Rights of franchise.**—If the officer conducting the election, maliciously infringes the right to vote at an election for a public office, or to be a candidate for the same, he will be liable, but not if he has acted honestly and to the best of that judgment and discretion which it is his duty to exercise (*Ashby v. White*, 2 Sm. L. C. 268; *Tozer v. Child*, 26 L. J. Q. B. 151).

*Leading cases.*—**Tozer v. Child ; Ashby v. White.**

(c). **Rights to an exclusive office or dignity.**—The invasion of an exclusive right to an office or dignity to which emoluments are attached, will be a ground for an action (*Kamalan v. Sadagopa*, 1 Mad. 356; *Sheo Suhaye v. Bhooree*, 3 W. R. 33; *Raja Shivapa v. Krishnabhat*, 3 Bom. 232; *Vithal v. Anant*, 11 B. H. C. 6; *Sitaram v. Sitaram*, 6 B. H. C. 250; *Krishnama v. Krishnasami*, 2 Mad. 62, p. c.).

No action will, however, lie to vindicate a right, not to an office, but to mere dignity unconnected with any fees, profits, or emoluments (*Gossain Doss v. Gooro Doss*, 16 W. R. 198; *Sangapa v. Gangapa*, 2 Bom. 476; *Rama v. Shivaram*, 6 Bom. 116; *Narayan v. Krishnaji*, 10 Bom. 233; *Karuppa v. Kolanthaya*, 7 Mad. 91). The usurper of a dignity is guilty of a wrong which is, to a certain degree, pre-judicial to every one who has a just title to the dignity; and the manner in which such a wrong is to be redressed must depend upon the municipal laws of each particular country. There may be no remedy, except by application to the executive Government, to punish the usurpation, or there may be a remedy to everyone whose dignity is lowered by the usurpation in a right of action against the usurper (*Sri Sunkur Bharti v. Sidha Lingayah*, 3 M. I. A. 39).

The Countess of Cowley, the wife of Earl of Cowley, a peer, having obtained a dissolution of marriage, married a commoner, and continued to use the name of Countess Cowley. Earl Cowley applied for an injunction to restrain her from using the style or title as being an invasion or disturbance of the dignity which belonged to him as an incorporeal hereditament. Held, that the Court has no jurisdiction to grant an injunction (*Earl Cowley v. Countess of Cowley*, (1901) A. C. 450).

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# TORTS TO PROPERTY.

## CHAPTER XVI.

### TORTS TO REALTY OR IMMOVABLE PROPERTY.

TORTS affecting immovable property arise either by disturbance or usurpation of the right to hold or possess it, whether such right be present or in expectation (*e. g.*, trespass, dispossession); or by actual physical damage to the property (*e. g.*, waste); or by interference with, or impairing of, the enjoyment of it (*e. g.*, nuisance).

#### *What is Possession ?*

Possession is described as "a legal state of things importing definite and valuable rights of which the law takes notice" (*P. & W.*, 28). The marks of possession, with regard to property, depend upon the nature of the property. It is not necessary in order to prove possession to prove an actual bodily continuous possession (*Watson & Co. v. Government*, 3 W. R. 73). Possession consists in a physical act accompanied by an act of the will. The first is not necessarily connected with any bodily contact with the whole or any part of the subject, but it implies the physical power of dealing with the subject immediately, and of excluding any foreign agency over it. The act of the will must contemplate a dealing with the subject as one's own property, and not on behalf of another. The continuance of the possession depends on the union of these essentials; and hence, if either one or the other, or both together, cease, the possession is lost (*Savigny*).

Possession involves a relation of fact between a person and an object, which relation is exercised by that person on his own behalf. If it is exercised on behalf of another that relation constitutes *custody* only, and the person

having custody only is not in possession. Although possession implies the detention of what we possess, yet, this detention ought not to be so understood as if it was necessary to have always either in our hand or in our sight things of which we have possession. But after possession is once acquired it is preserved without actual possession (*Watson v. The Government*, 3 W. R. 73). The owner of a thing may retain possession of it through a servant, trustee, or other representative. A landlord is in constructive possession of the soil, through his tenant (*Venkatchalam v. Andiappan* 2 Mad. 232). This doctrine of constructive possession applies only in favour of a rightful owner and is not extended in favour of a wrong-doer (*Mohini v. Pro-moda*, 24 Cal. 256). 'When there is an intention to hold a thing as owner, it is not necessary that it should be enjoyed in any particular way, but it is sufficient if some overt act is done upon the thing in the execution of such intention' (*Sivasubramanya v. Secretary of State*, 9 Mad. 503).

One who relies on *de facto* possession as investing him with those rights, and entitling him to the appropriate remedies, has to satisfy the Court that he, rather than any other person, was, at the time of the wrong he complains of, *in a certain relation to the thing* of which the use or enjoyment is in question. He must prove a state of facts which will be sufficient in law to support his claim. In regard to immovables, this *relation* cannot obviously be comprehension, or a complete physical control applied to the thing as a whole. It is impossible to possess a house, a wood, or a field, as we possess the money in our pockets. All that possession of immovables can consist of is (1) a more or less discontinuous series of acts of dominion, *i. e.*, such acts as an occupying owner might be expected to exercise, and (2) the fact that no one else has so dealt with the property (*P. & W.*, 29, 30).

(1). With regard to these 'acts of dominion,' two things may be remarked: (a) that the *nature* of these acts must vary according to the nature of their subject matter, and (b) that acts of dominion over *part* of the thing in dispute may be evidence of *de facto* possession of the whole.

(a) As to their nature. By possession is meant possession of that character of which the thing is capable (*Lord Advocate v. Young*, 12 App. Cas. 544); and what amounts to a sufficient occupation must depend upon the nature of the soil, and the uses to which it is to be applied. Thus, acts which constitute possession of a house, or of arable land, or of land held for shooting purposes, or of mines below the surface of the ground, may all be of a different nature respectively (*Nelson*, 99).

"Possession is not necessarily the same thing as actual user. The nature of the possession to be looked for, and the evidence of its continuance, must depend upon the character and condition of the land in dispute. Land is often either permanently or temporarily incapable of actual enjoyment in any of the customary modes as by residence or tillage or receipts of a settled rent. It may be incapable of any beneficial use, as in the case of land covered with sand or by inundation; it may produce some profit, but trifling in amount, and only of occasional occurrence as is often the case with jungle land. In such cases it would be unreasonable to look for the same evidence of possession as in the case of a house or a cultivated field. All that can be required is that the plaintiff should show such acts of ownership as are natural under the existing condition of the land, and in such cases, when he had done this, this possession is presumed to continue as long as the state of the land remains unchanged, unless he is shown to have been dispossessed" (per Wilson, J., in *Mahomed Ali v. Khaja Abdul*, 9 Cal. 751; *Mohini v. Krishna*, 9 Cal. 802).

(b) Acts of ownership over part of the property may be evidence of the possession of the whole (*Jones v. Williams*, 2 M. & W. 326, 331). When a party proves possession of a certain portion of a tract of land with a defined boundary, his possession may be presumed to extend over the remainder of the tract (*Siva Subramaniya v. Secretary of State*, 9 Mad. 285; *Bijai Nath v. Bengal Coal Co.*, 14 Cal. 740).

(2). Proof that no one else has so dealt with the property. There should be an exclusive exercise of acts of dominion.

The possession of a movable is lost, when another makes himself master of it, either secretly or by force; the exclusion is then complete. But as to land, it is clear that although by mere absence the power of dealing with it at will become a more remote relation, it is not at all put an end to by it. There must be something in addition to absence; hence, he who occupies land in the absence of the possessor, is not considered to have ousted him, till the possessor has had notice, and is either unable to enter upon his possession, or voluntarily refrains from so doing (*Savigny*).

Possession may be either (1) without title or (2) with title.

(1). A party claiming to have possession *without title* must show that he has a *de facto* possession, that is to say, actual physical prehension of the particular portion of the soil to the substantial exclusion of all other persons from participating in the enjoyment of it. What amounts to such a *de facto* possession must in all cases be a question of degree, but the physical prehension must extend over substantially the whole subject-matter over which the possession is claimed. It is obvious that two persons claiming adversely cannot be in possession of the same portion of the land at

one and the same time, therefore a person claiming without title cannot be said to have a *de facto* possession unless the true owner has been dispossessed. Further, in order that occupation may amount to what the law understands by possession, not only must it be exclusive, but it must also have been had *animo possidendi*: the party claiming to have had possession must have intended to deal with the land as owner. One who without title acquires possession of the surface of land, *prima facie* thereby acquires possession of the minerals also (*Smith v. Lloyd*, 9 Ex. 574). A possession which satisfies the two conditions (1) that of being substantially exclusive; and (2) that of being enjoyed *animo possidendi*, confers during its continuance an interest in the subject-matter of the possession as against all who cannot show a title to it; it gives a right to retain the possession and undisturbed enjoyment as against all wrong-doers. Possession without title may be lost in any one of the following ways:—(a) by voluntarily abandoning it; (b) if the possessor without title is expelled by a trespasser who has himself no title he may lose his possession by submitting to the expulsion; or (c) by delaying to re-expel the intruder within a reasonable time (*C. & L.*, 281).

A person in possession of land without title has an interest in the property which is heritable and good against all the world except the true owner, an interest which, unless and until the true owner interferes, is capable of being disposed of by deed or will, or by execution sale, just as in the same way as it could be dealt with if the title were unimpeachable (*Gobind Prasad v. Mohun Lal*, 21 A. W. N. 204).

(2). The possession of a person *having title* to the land differs from that of a person who has no title in this, that it need not be exclusive; the fact that others are in the habit of wrongfully using a way over his land will not

cause him to be any the less in possession of the soil of the way, for his title will, in such case, give him the constructive possession.

Possession that has been recognised in law as entitled to protection and enforcement is such as was not acquired *nec vi nec clam nec precario ab adversario*. A person who has acquired possession from his adversary either by force (*vi*) or clandestinely (*clam*) or by permission (*precario*) cannot be regarded as having acquired juristic possession. Possession in law is a substantive right or interest which exists and has legal incidents and advantages apart from the true owner's title. Hence it is itself a kind of title, and it is a natural development of the law, whether necessary or not, that a possessor should be able to deal with his apparent interest in the fashion of an owner not only by physical acts but by acts in the law, and that as regards every one not having a better title those acts should be valid (*P. & W.*, 19).

Torts purely affecting real or immovable property are :—

- |                                |                        |
|--------------------------------|------------------------|
| 1. Trespass.                   | 5. Waste.              |
| 2. Dispossession.              | 6. Injuries to Natural |
| 3. Trespass <i>ab initio</i> . | rights and Easements.  |
| 4. Injuries to reversion.      |                        |

### 1. *Trespass*.

Trespass, in its widest sense, signifies any transgression or offence against the laws of Nature, of society, or of the country in which we live, whether relating to a man's person or to his property (*Brown*). But the most obvious acts of trespass are (1) trespass *quare clausum fregit* (entry on another's land), and (2) trespass *de bonis asportatis* (taking another's goods).



**Trespass to land** is the wrongful and unwarrantable entry upon the soil or land of another person. If a man's land is not surrounded by an actual fence, the law encircles it with an imaginary enclosure, to pass which is to break and enter his close. The mere act of breaking through this imaginary boundary constitutes a cause of action, as being a violation of the right of property, although no actual damage may be done. Every trespass upon land is, in legal parlance, an injury to the land, although it consists merely in the act of walking over it, and no damage is done to the soil or grass. Every injury to the possession of the occupier is, in principle, an injury to the property; and therefore, if a man is unlawfully turned out of his dwelling house, that amounts, in point of law, to an injury to the dwelling house (*Meriton v. Coombs*, 9 C. B. 787—*Addison*).

To constitute the wrong of trespass neither force, nor unlawful intention, nor actual damage, nor the breaking of an enclosure is necessary. The trifling nature of the trespass is no defence, and the maxim *de minimis non curat lex* has no application to the law of trespass. "Every invasion of private property, be it ever so minute, is a trespass" (*Entick v. Carrington*, 19 St. Tr. 1066).

**Entry** is essential to constitute a trespass. It may be either *actual* or *constructive*. *Constructive entry* may be described as every interference with the land of another, *e. g.*, throwing stones or materials over a neighbour's land.

Throwing stones, rubbish, or materials of any kind, on the land of another, is a trespass (*Cox v. Burbidge*, 13 C. B. N. S. 438). To pour water out of a pail into another man's yard, or to fix a spout so as to discharge water upon another's land, or to suffer filth to ooze through a boundary wall and to turn over another's close or yard without his leave or permission, is a trespass; unless a right of way over the adjoining close, or a right to discharge water upon it, or a right for the passage of waste water and refuse through it has been gained (*Reynolds v. Clarke*, 1 Ld. Raym. 1399).

Driving nails into another's wall, or placing objects against it, are trespasses (*Lawrence v. Obec*, 1 Stark. 22; *Gregory v. Piper*, 9 B. & C. 52); so is fox-hunting across land against the will of the owner (*Paul v. Summerhayes*, 4 Q. B. D. 9). The plaintiff was possessed of land which was crossed by a highway. A trainer of race-horses had agreed with the plaintiff for the use of some of his land for the training and trial of race-horses. A view of the land so used could be obtained from the highway on the plaintiff's land. Defendant, a proprietor of a publication which gave accounts of the doings of race-horses in training, walked backwards and forwards on a portion of the highway on the plaintiff's land about fifteen yards in length for an hour and a half, watching and taking notes of the trials of race-horses on the plaintiff's land. In an action for trespass it was held that the defendant had exceeded the ordinary and reasonable user of a highway as such to which the public are entitled, and was liable for trespass (*Hickman v. Maisey*, (1900) 1 Q. B. 752; *Harrison v. Duke of Rutland*, (1893) 1 Q. B. 142).

Where one parts with the right to the surface of land, retaining only the mines, he cannot maintain an action for trespass to the surface, because he is not in possession of it (*Cox v. Monseley*, 5 C. B. 549); but he may for a trespass to the subsoil, as by digging holes, &c. (*Cox v. Glue*, 17 L. J. C. P. 162).

An apprehended trespass furnishes no ground of action (*Parum Sookh v. Seeta Ram*, 2 Agra 119; *Gibbon v. Abdur Rahman*, 3 B. L. R. A. C. J. 411; *Poorun Chand v. Paresb Nath*, 12 W. R. 82).

Continuing trespass.—If a man throws a heap of stones, or builds a wall, or plants posts of rails, on his neighbour's land, and there leaves them, an action will lie against him for the trespass; and the right to sue will continue from day to day, till the incumbrance is removed. An action may be brought for the original trespass in placing the incumbrance on the land, and another action for continuing the thing so erected; for the recovery of damages in the first action, by way of satisfaction for the wrong, does not operate as a purchase of the right to continue the injury (*Holmes v. Wilson*, 10 Ad. & E. 503; *Bowyer v. Cook*, 4 C. B. 236). But, where the injury is not of a continuing nature, and the damages which flow there-

from, when they accrue, have accrued once for all, then the recovery of judgment in a previous action is a good bar (*Addison*).

**Trespass by joint-owners.**—Joint-tenants or tenants-in-common, can only sue one another in trespass for acts done by one inconsistent with the rights of the other (*Jacobs v. Seward*, L. R. 5 H. L. 464). Such acts are, for example, destruction of buildings (*Cresswell v. Hedges*, 31 L. J. Ex. 49), carrying away of soil (*Wilkinson v. Haggarth*, 12 Q. B. D. 837), or expulsion of the other or his servant off the land, or out of the house holden in common (*Murray v. Hall*, 7 C. B. 441).

But it is not a trespass if one tenant-in-common cuts and carries away in due season the whole produce of the common property, but the remedy of the other tenant-in-common is a suit for an account (*Jacobs v. Seward*, L. R. 4 C. P. 328).

A Court of Equity will not interfere where a tenant-in-common acts reasonably for the purpose of enjoying the property held in common in any way in which an owner can enjoy such property without injury to his co-parcener, but the case is different where there has been a direct infringement of a clear and distinct right (*Gopee Kishen v. Hem Chunder*, 13 W. R. 322; *Dirgpaul v. Bhondo Rai*, 2 Agra 341; *Mehdee Hossein v. Ajud Ali*, 6 N. W. P. 259; *Guru Das v. Bijaya Gobinda*, 10 W. R. 171; 1 B. L. R. A. C. J. 108; *Crowdee v. Bhekdhari*, 8 B. L. R. AP. 451; *Holloway v. Sheikh Wahed Ali*, 12 B. L. R. 191n, 16 W. R. 140; *Crowdy v. Indar Roy*, 18 W. R. 408; *Sheopershad v. Leela Singh*, 12 B. L. R. 188; 20 W. R. 160; *Stalkartt v. Gopal Panday*, 12 B. L. R. 197; 20 W. R. 160; *Hunooman Sing v. Crowdie*, 23 W. R. 428; *Lloyd v. Sogra*, 25 W. R. 313; *Debee Pershad v. Gujadhur*, 25 W. R. 374; *Rajendro Lall v. Shama Churn*, 9 Cal. 188; *Holloway v.*

*Muddun Mohun*, 8 Cal. 446; *Watson & Co. v. Ramchand*, 18 Cal. 10; *Najju Khan v. Imtiaz-ud-din*, 19 All. 115; *Muham-mad v. Faiz Baksh*, 18 All. 361).

*Leading case.*—**Murray v. Hall.**

Where a joint-owner or co-sharer has erected a building on joint land the Court can order its demolition (*Guru Das v. Bijaya Gobinda*, 1 B. L. R. 109; 10 W. R. 171; *Bissambhar Shaha v. Shib Chunder*, 22 W. R. 281; *Rajendro Lall v. Shama Churn*, 5 Cal. 188; *Shadi v. Anup Singh*, 12 All. 436; *Kanakayya v. Narasimhulu*, 19 Mad. 381). But, where the act complained of is not proved to be destructive or detrimental to the enjoyment of the joint property, the Court will refuse to order its demolition (*Nabin Chandra v. Mahes Chandra*, 3 B. L. R. AP. 111; 12 W. R. 69; *Lala Biswambharlal v. Rajaram*, 3 B. L. R. AP. 67; 13 W. R. 337n.; *Sri Chand v. Nim Chand*, 5 B. L. R. AP. 25; 13 W. R. 337; *Dwarkanath v. Goopeenath*, 12 B. L. R. 189; 16 W. R. 10; *Massim Mollah v. Panjoo Ghoramee*, 21 W. R. 373; *Mohima Chunder v. Madhub Chunder*, 24 W. R. 80; *Doorga Lall v. Lalla Hulwant*, 25 W. R. 306; *Nocury v. Brindabun*, 8 Cal. 708; *Shamnugger &c Co. v. Ram Narain*, 14 Cal. 189; *Joy Chunder v. Bippro Churn*, 14 Cal. 236; *Paras Ram v. Sherjit*, 9 All. 661).

**Trespass by cattle.**—Trespass by a man's cattle is dealt with similarly to trespass committed by himself. In the case of animals trespassing on land, the mere act of the animal belonging to a man, which he could not foresee, or which he took all reasonable means of preventing, may be a trespass, inasmuch as the same act if done by himself would have been a trespass (per Brett, J., in *Ellis v. Loftus Iron Co.*, L. R. 10 C. P. 13). If a man's cattle, sheep, or poultry, or any animals in which the law gives him a valuable property, trespass on another's close, the owner

of the animals is responsible for the trespass and consequential damage, unless he can show that his neighbour was bound to fence and had failed so to do (*Sagrill v. Melivard*, Y. B. 21 Hen. VI. p. 33). But, if no such duty to repair exists, the owner of cattle is liable for their trespasses even upon unenclosed land (*Boyle v. Tamlin*, 6 B. & C. 337), and for all naturally resulting damage. So strict is the rule that if any part of an animal which the owner is bound to keep in is over the boundary, the trespass is complete. The rule does not apply to damage done by cattle straying off a highway on which they are being lawfully driven; in such case the owner is liable only on proof of negligence (*Goodwin v. Cheveley*, 4 H. & N. 631).

Where the defendant's horse injured the plaintiff's mare by biting and kicking her through an iron fence belonging to the defendant which separated the defendant's land from the plaintiff's, it was held that there was a trespass for which the defendant was liable apart from any question of negligence (*Ellis v. Loftus Iron Co.*, L. R. 10 C. P. 10). Whenever two persons have adjoining fields with no hedge or fence between them, each must take care that his own beasts do not trespass on his neighbour's field (*Boyle v. Tamlin*, 6 B. & C. 337). Where the owner of a horse negligently allowed his horse to stray on the high road, it was held that the owner would be responsible for all such damage as in the ordinary sequence of events might be expected to occur therefrom, such as the horse's walking into a neighbouring pasture, and consuming the grass there, or wandering into a cornfield and trampling down the corn, but not for a kick to a child on the road, unless it could be shown that the horse was naturally of a vicious disposition (*Cox v. Burbridge*, 13 C. B. N. S. 430). Where cattle affected with a contagious disorder trespassed upon an adjoining pasture and infected other cattle there with the disease, it was held that the owner of the trespassing beasts was responsible for the damage arising from the spread of the disorder, as well as for the injury to the grass and herbage (*Anderson v. Buckton*, 1 Str. 192).

If a man's dog goes into his neighbour's garden, and spoils and injures his crops, no action will lie, unless the dog is of a peculiarly mischievous disposition; because a man is not considered to have the same valuable property in a dog as in cattle and sheep (*Mason v. Keeling*, 12 Mod. 336).

*Indian case.*—In a suit in which it is proved that defendants maliciously and from gross negligence allowed their cows to trespass on plaintiff's lands, and to destroy the indigo plants thereon, knowing the value of the crops to the plaintiff, it was held that the case was one of tort in which, the wrong being deliberate and malicious, the plaintiff was entitled by way of damages, not to the mere value of the growing plants destroyed as the actual loss sustained, but to substantial damages sufficient to compensate the plaintiff the loss of profits which would have been obtained from the indigo plant (*Sreehuree v. James Hill*, 9 W. R. 156).

#### REMEDIES.

The person whose land is trespassed upon may—

1. Bring an action for trespass against the wrongdoer ; or
2. Forcibly defend his possession against a trespasser, or
3. Forcibly eject him.

1. **Action.**—To maintain an action for trespass, a plaintiff must prove that he was in *possession*, either actual or constructive, at the time of trespass. A mere *interesse termini* is not sufficient (*Wallis v. Hands*, (1893) 2 Ch. 75). *Constructive possession* means, either the possession of an agent or servant, or an immediate right to possess, or possession conferred by law in certain cases independently of any physical prehension or transfer (*Smith v. Milles*, 1 T. R. 480). Possession is the great requirement, and if the plaintiff prove that he is in possession, that makes out a sufficient *prima facie* case on which he can recover. In such an action not only is it not incumbent on the plaintiff to show a title, but it is no answer for the defendant to show that the title and right to possession is in another person ; *jus tertii* (the right of a third person) is no defence to the action, unless the defendant can show that the act complained of was done by the authority of the true owner (*Graham v. Peat*, 1 East 244 ; *Chambers v. Donaldson*, 11 East 65). Nor does it matter how recently the possession

was acquired (*Catteries v. Cowper*, 4 Taunt. 547). Where a person is in possession of land, the *onus* lies upon the *prima facie* trespasser to show that he is entitled to enter (*Asher v. Whitlock*, L. R. 1 Q. B. 1).

A person *entitled* to the possession of lands or houses cannot bring an action of trespass against a trespasser until he is in actual possession of them (*Ryan v. Clark*, 14 Q. B. D. 65). But when he has once entered, he acquires the actual possession, and such possession dates back to the time of the legal commencement of his right of entry, and he may, therefore, maintain actions against intermediate and then present trespassers (*Anderson v. Radcliffe*, 29 L. J. Q. B. 128; *Butcher v. Butcher*, 7 B. & C. 402).

The owner who has parted with possession in favour of a tenant or lessee, cannot maintain an action for trespass; he is, however, entitled to sue where an injury is done to his reversionary estate, provided that such injury is of a *permanent* nature, and deteriorates the actual marketable value of the property (*Tucker v. Newman*, 11 A. & E. 40). In such cases, the tenant is entitled to sue in respect of the immediate injury, and the reversioner in respect of 'the diminished saleable value of the property.'

If two persons are in possession of land, each asserting his right to it, then the person who has the title to it is to be considered in actual possession and the other person is a mere trespasser (*Jones v. Chapman*, 2 Ex. D. 821).

*Indian law.*—The law of England that a landlord who has parted with his possession to a tenant cannot sue in trespass for damage to the property, unless the wrongful act complained of imports a damage to the reversionary interests, does not apply to landlords in India (*Venkatachalam v. Andiappan*, 2 Mad. 232; *Dheermoney v. Croft*, 3 W. R. S. C. REF. 20; *Monindro v. Moneeruddeen*, 20 W. R. 230, 11 B. L. R. AP. 40; *Ram Chandra v. Jiban Chandra*,

13 B. L. R. A. C. J. 203). Any one of several joint-tenants of land may sue to eject a trespasser. The consent of one joint-tenant to the possession of a trespasser does not make him the less a trespasser with regard to other joint tenants (*Teeluk v. Ramjus*, 5 N. W. P. 182; *Lutchman v. Dabee*, 3 Agra 264; *Ghunshyam v. Runjeet*, 4 W. R. ACT X, 39, *contra Luchmun v. Seami*, 5 W. R. ACT X, 93).

2. **Defence.**—The person in possession may use force to keep out a trespasser; but if the trespasser has succeeded in obtaining possession the right owner cannot use force to put him out, but must appeal to the law for assistance (*Piggott*).

3. **Expulsion.**—A mere trespasser cannot, by the very act of trespass, immediately, and without acquiescence on the part of the land-owner, become possessed of the land, and he may consequently be expelled by main force; but if a landowner sleeps upon his rights, the other will gain possession, and cannot be forcibly ejected (*Brown v. Dawson*, 12 Ad. & E. 624).

A person is justified in removing a trespasser from his lands, provided he first requires him to leave and in removing him he does not use a greater amount of force than is necessary under the circumstances.

#### JUSTIFICATIONS.

The justifications or defences to an action for trespass are:—

- |                        |                                 |
|------------------------|---------------------------------|
| 1. Prescription.       | 5. Self-defence.                |
| 2. Leave and license.  | 6. Re-entry on land.            |
| 3. Authority of Law :  | 7. Retaking of goods or         |
| (a) Execution of legal | cattle.                         |
| process.               | 8. Abating a nuisance.          |
| (b) Distress.          | 9. Special property or          |
| (c) Distress damage    | Easement.                       |
| feasant.               | 10. <i>Liberum tenementum</i> . |
| 4. Acts of Necessity.  |                                 |



1. *Prescription.*

A defendant may plead that he was justified by reason of prescription, as by showing a right of common, or right of way over the land; or that his right of way was wrongfully obstructed by the plaintiff, and the trespass was necessary to avoid it (*Marshall v. Ulleswater S. N. Co.*, L. R. 7 Q. B. 166; *Bourke v. Davies*, 44 Ch. D. 110).

2. *Leave and license.*

A license is a mere permission to do an act, which if done without that permission would, with respect to land, be a trespass *quare clausum fregit* (*Brown*).

A dispensation or license properly passeth no interest, nor alters or transfers property in anything, but only makes an action lawful which without it had been unlawful (*Thomas v. Sorrell*, Vaug. 351). License may be express or implied. Entry to a shop or public house is a case of implied license (*Blackstone*). If the defendant relies upon a plea of leave and license, he must prove, either an express permission from the plaintiff to the defendant to come upon the land, or circumstances from which such permission may fairly be implied (*Ditchman v. Bond*, 3 Camp. 524).

The license to be a good defence, must be from one having authority to give such and it must be co-extensive with the acts complained of, or the plaintiff may recover for the acts in excess (*Taylor v. Fisher*, Cro. Eliz. 245). A license obtained by wilful misrepresentation and deceit is a mere nullity, and will not justify, or excuse a trespass by a defendant who was a party to the misrepresentation (*Roper v. Harper*, 4 Bing. N. C. 20). There will be no license to do what is illegal (*Edwick v. Hocks*, 18 Ch. D. 209).

3. *Authority of law.*

(a) **Execution of legal process.**—An officer may enter into a house to serve a legal process (*Keane v. Reynolds*, 2 E. & B. 748).

It is lawful to enter upon the house or land of an execution debtor in order to search for and seize his person or property, according to the nature of the execution. But a special sanctity attaches to the dwelling-house, which is an Englishman's castle, and may not be broken open, even after demand of admittance made and refused. In many of the old cases it is said that the sheriff may only enter if the door be open, and accordingly it is laid down that he is a trespasser if he goes in by lifting the latch (*Barker v. St. Quintin*, 12 M. & W. 441), but this has been questioned (Com. Dig. Execution c. 5). He may enter by lifting a window partially open. Any outbuilding not adjoining or being part of a dwelling-house may be forced (*Hodder v. Williams*, (1895) 2 Q. B. 663—*C. & L.*, 647).

But "when the king is a party" as, *e. g.*, in the case of the apprehension of a felon, the officer may enter the house as best he may by breaking the door or otherwise. It must, however, be carefully noted that no such breaking becomes justifiable until the officer, having given due notice of his business, and having demanded admission, has been refused to be allowed to enter the house (*Shirley*, 445). Outer doors may also be broken in execution of process at the suit of the Crown, or for contempt of a House of Parliament or of a superior Court (*Glasspole v. Young*, 9 B. & C. 696). There are also several statutes authorising public servants, and in some case private persons, to enter on lands and into houses for divers purposes.

The house of any one is not a castle or privilege but for himself, and shall not extend to protect any person who

flies to his house, or the goods of any other which are brought and conveyed to his house, to prevent a lawful execution, and to escape the ordinary process of law; for the privilege of his house extends only to him and his family, and to his own proper goods, or to those which are lawfully and without fraud and covin there; and therefore, in such cases, after denial on request made, the sheriff may break the house (*Semayne's case*, 5 Rep. 93). However, he enters at his peril, whether he does so peaceably or not. He has no right of entry for the purpose of search, but is only justified if the person whom he desires to arrest or the goods which he desires to seize are in the house (*Morrish v. Murray*, 13 M. & W. 52). It has been said that if the sheriff enters the house of a stranger, even through an open door, he does so at his peril, and, if the goods of which he is in search are not found there, he is a trespasser (per Dallas, J., in *Cooke v. Birt*, 1 Marsh. 333). It appears, then, that although the sheriff cannot break the doors of one's house in the execution of a civil process against one's own goods, he may yet justify a breach for the purpose of seizing the goods of a stranger whose ordinary residence is elsewhere. A house, however, in which a man habitually resides would seem, on principle and on authority, to be on the same footing as his own house so far as executions are concerned, for it is there that one would naturally expect to find him and his goods. The sheriff, therefore, cannot break the outer door of such a house to execute any process against the man's goods (*Shirley*, 446).

*Semayne's case* establishes the following points:—

1. That the house of every one is to him as his castle and fortress as well for his defence against injury and violence, as for his repose.
2. When any house is recovered by any real action, or by *eject' firmæ*, the sheriff may break the house and

deliver the seisin or possession to the demandant or plaintiff.

3. In all cases, when the King is party, the sheriff (if the doors be not open) may break the party's house either to arrest him, or to do other execution of the King's process, if otherwise he cannot enter. But before he breaks it, he ought to signify the cause of his coming, and to make request to open the doors.

4. In all cases when the door is open the sheriff may enter the house, and do execution, at the suit of any subject, either of the body or of the goods; and so may the lord in such case enter the house and distrain for his rent or service. But it is not lawful for the sheriff (on request made and denial) at the suit of a common person to break the defendant's house, &c., to execute any process at the suit of any subject.

5. The house of any one is not a castle or privilege but for himself, and shall not extend to protect any person who flies to his house, or the goods of any other which are brought and conveyed into his house, to prevent a lawful execution, and to escape the ordinary process of law; for the privilege of his house extends only to him and his family, and to his own proper goods, or to those which are lawfully and without fraud and covin there; and therefore in such cases, after denial on request made, the sheriff may break the house.

*Indian law.*—"As regards the first four of these points, there is little doubt that the law laid down in them is in accordance with the law in force in India. If a bailiff break the doors of a third person, in order to execute a decree against a judgment-debtor, he is a trespasser if it turn out that the person or goods of the debtor are not in the house" (per Melvill, J., in *Dadabhai v. Sub Collector of Broach*, 7 Bom. H. C. 83, 85). A *nazar* or sheriff cannot

break open a defendant's dwelling-house to execute civil process against his person or goods if the outer-door is closed and locked, even when he finds that the defendant has absconded to evade such execution. The privilege extends to a man's dwelling-house, or outhouse or any office annexed to the dwelling-house, but not to a building standing at a distance from the dwelling-house and not forming parcel of it (*Bai Kuvar v. Venidas*, 7 Bom. H. C. 127; *Sadamini Dosi v. Jogeswar*, 5 B. L. R. 27; *Damodar v. Ishvar*, 3 Bom. 89; *Penton v. Browne*, 1 Keble 698).

B and G lived together in a house at Blackfairs as joint-tenants. B contracted heavy debts, and one of the largest and pressing of his creditors was Semayne, to whom he "acknowledged a recognizance in the nature of a Statute staple." In these circumstances B died, and by right of survivorship, the ownership of the house, became vested in G. In that house were "divers goods" of B, and to these, in virtue of the Statute staple, Semayne not unreasonably considered himself entitled. Accordingly, he instructed the sheriffs of London to do the best for him and these persons armed with a proper writ, set off for Blackfairs. But when they came to the house, G who had come to know of this, shut the door in their faces, "whereby they could not come and extend the same goods," disturbing the execution. In an action brought by Semayne it was held that G had done nothing wrong in locking the front door, and that, even when the King is a party, the house-holder must be requested to open the door before the sheriff can break his way in (*Semayne v. Gresham*, 5 Coke 91). The protection from a forcible entry by a sheriff's officer for the purpose of execution, which the law affords to a man's dwelling-house does not extend to a shop where he does not reside (*Hodder v. Williams*, (1895) 2 Q. B. 663).

*Leading case.*—**Semayne's case.**

(b). **Distress.**—A distress is a remedy for the performance of a duty, or the satisfaction of a demand, which consists in the taking, without legal process, of a personal chattel from the possession of the defaulter into the hands of the party grieved, as a pledge for the performance or satisfaction required; with a power in case of continued default to sell the thing taken in compensation for the damage sustained (*Bullen*, 16). As between landlord and

tenant, any rent reserved by demise, and in arrear, may be recovered by distress upon any goods or cattle found upon the demised premises without previous demand being made. But a landlord may divest himself of this right (*Giles v. Spencer*, 3 C. B. N. S. 244; *Welsh v. Rose*, 6 Bing. 638; *Miles v. Furber*, L. R. 8 Q. B. 77; *Pape v. Westacott*, (1894) 1 Q. B. 272). Unless there be an express and unqualified power of distress by agreement, the right depends upon there being an actual demise to a tenant with a fixed rent reserved. The reservation of an annual sum in a demise will not in itself be sufficient (*Smith v. Mapleback*, 1 T. R. 441). The rent must be payable at a certain time. The right to distrain is lost upon an assignment of the lessor's interest (*Hazeldine v. Heaton*, C. & E. 40). It is one of the most ancient and effectual remedies for the recovery of rent.

Executors, administrators, guardians, married women, mortgagees, receivers, agents, joint-tenants, tenants-in-common, &c., may distrain.

A distress may be absolutely illegal in a variety of ways: if made after tender; if made after a previous distress; if it be made at the wrong place or time; if the manner of the entry be wrongful; if the goods are taken which the law protects from distress; if distress is made contrary to agreement or by taking advantage of the distrainer's own wrong; and if made by unqualified persons (*C. & L.*, 244). There can be no distress against the Crown, or foreign ambassadors and their servants, or against companies in liquidation.

Where the original entry of a distrainer is unlawful the whole of his subsequent proceedings are necessarily unlawful likewise, and he is liable for any goods which he may seize to the same extent as any other trespasser (*Attack v. Bramwell*, 3 B. & S. 520).

(c). **Distress damage feasant** is a remedy by which, if cattle or other things be on a man's land encumbering it, or otherwise doing damage there, he may summarily seize them, without legal process, and retain them impounded as a pledge for the redress of the injury he has sustained (*Bullen*, 227). It is applicable whenever any thing, animate or inanimate, is upon the land actually doing damage thereto or to its produce, and is available for any person who is aggrieved by such damage. This right is founded on the principle of recompense, which justifies a person in retaining that which occasions injury to his property till amends be made by the owner (*Woodfall*). The distress being a remedy for trespass, the right can be exercised only by a person who has a sufficient possession of land to entitle him to maintain an action of trespass. All chattels whatever are distrainable *damage feasant*, except things in actual use (*Storey v. Robinson*, 6 T. R. 138). Thus, a locomotive has been distrained *damage feasant* where it has not been actually straying, but had been put on a Railway company's line without the statutable approval of that company (*Ambergate Ry. v. Midland Ry.*, 2 E. & B. 793). The distress must be taken at the time the damage is done; for, if the damage was done yesterday, and the distress taken to-day, that would be illegal (*Wormer v. Briggs*, 2 C. & K. 31; *Vaspor v. Edward*, 12 Mod. 660). If, therefore, a man coming to distrain beasts *damage feasant* sees the beasts on his ground, and the owner of the beasts, or his servant, chases them out before the distress is taken, though it is done purposely to prevent the distress, yet the owner of the soil cannot distrain them; for the beasts must be *damage feasant* at the time of the distress.

Where there is no trespass there is no right of distress. If cattle on being driven lawfully along a road stray on to

the unfenced land adjoining, they cannot be distrained until there has been a reasonable time for driving them out (*Goodwin v. Cheveley* 4 H. & N. 631); but if they are unlawfully on the road they may be distrained directly they stray from it to the adjoining land (*Dovaston v. Payne*, 2 H. Bl. 527). Where cattle stray by reason of the defect of fences which the occupier is bound to repair, there is no actionable trespass and no right to distrain until the owner of the cattle has notice (2 Wms. Saund. 671). Distress *damage feasant* is not allowed against a party having any colour of right (*Cape v. Scott*, L. R. 9 Q. B. 269).

For *damage feasant* one may even distrain in the night; but a distress for rent can be made during day only.

*Indian law.*—It may be doubted if the right of distress *damage feasant* would be held to exist, except under express law, in this country. But there is a special enactment, *viz.*, Cattle Trespass Act (I of 1871) which contains special provisions regarding the impounding of cattle taken trespassing and doing damage.

#### 4. *Acts of necessity.*

Entry on the land of another person without his consent is justifiable on the ground of necessity, *e.g.*, putting out fires for public safety, defence of the realm, &c.

#### 5. *Self-defence.*

A trespass may be excused as having been done in self-defence, in order to escape from some pressing danger or apprehended peril, or in defence of the possession of a man's goods, chattels, cattle, sheep, or domestic animals (*Addison*).

#### 6. *Re-entry on land.*

In England, if one is wrongfully in possession, and the rightful owner enters, he is no trespasser, but thereby



acquires possession, and may bring trespass against any person who continues upon the land (*Taylor v. Cole*, 1 Sm. L. C. 151). So that he who has the freehold and the right of entry, may justify a forcible entry, though he may be liable to an indictment for the public offence (*Harbey v. Bridges*, 14 M. & W. 442). The party in wrongful possession cannot recover damages from the rightful owner who forcibly turns him out of possession; but he may recover for independent acts of wrong done in the course of entry (*Beddall v. Maitland*, 17 Ch. D. 188). The right rule seems to be that if a man having a right to possess, can, without any breach of the law, get to himself the possession, he is quite justified in so doing; and his right will thus become clothed with a legally complete and exclusive possession. But if to regain possession, he must do something which, apart from his right to possess, would be a wrong in relation to the other who has the possession in fact, then the bare right to possess will not justify the act done any more than if there had been no such right; he must invoke the aid of the law (*Collett*).

*Indian law.*—Under the Specific Relief Act (I of 1877, s. 9), and in the Presidency of Bombay under the Bombay Mamlatdar's Courts Act (Bom. Act III of 1876, s. 4, cl. 2), if one in possession of immovable property is dispossessed otherwise than by course of law, he may, within six months, sue to recover possession without reference to any title set up by another, which is left to be determined in a separate action.

The Bombay High Court has pointed out the distinction between the English and the Indian laws on this subject thus:—"In Pollock on Torts the English law on the effect of possession obtained by the true owner by peaceful or forcible entry is stated, after an examination of the somewhat conflicting authorities, to be that the

possession of a rightful owner gained by forcible entry is lawful as between the parties, but that he may be punished for the breach of the peace by losing it, beside paying a fine to the King. This latter part of the law is the result of the Statute of 5 Richard II. to which we have nothing corresponding in this country. The Indian Legislature has, however, provided for the summary removal of any one who dispossesses another, whether peaceable or otherwise than by due course of law ; but subject to such provision there is no reason for holding that the rightful owner so dispossessing the other is a trespasser, and may not rely for the support of his possession on the title vested in him, as he clearly may do by English law. This would also appear to be the view taken by West, J., in *Lillu v. Annaji*, 5 Bom. p. 390" (per Sargent, C. J., in *Bandu v. Naba*, 15 Bom. 241).

B purchased land from M and subsequently brought a suit against M to obtain possession. He got a decree but did not execute it within three years. M died, and after his death and while his daughter (the plaintiff) was a minor, B took forcible possession of the land. Eight years afterwards the plaintiff attained her majority, and she then filed this suit to recover the land. The lower Court held that B having failed to execute his decree for possession was wrong in taking possession during the minority of the plaintiff without the intervention of a Court ; that in so doing he was a trespasser, and that the plaintiff, as M's heir, was entitled to have possession given to her, until ousted in due course of law. Held (reversing the decree) that, subject to the provision of s. 9 of the Specific Relief Act (I of 1877), there is no reason for holding that in India the rightful owner dispossessing another is a trespasser, and may not rely for the support of his possession on the title vested in him, as he clearly may do by English law (*Bandu v. Naba*, 15 Bom. 238).

*Leading case.*—**Taylor v. Cole.**

### 7. *Retaking of goods and cattle.*

An entry on plaintiff's land may be justified on the ground that the plaintiff took the defendant's goods and carried them on to his own land, wherefor the defendant

entered the plaintiff's land and took his goods back again (3 Vin. Abr. Trespass 1); but the entry is not justifiable from the mere fact of the defendant's goods being on the plaintiff's land. It must be shown that they came there by the plaintiff's act (*Patrick v. Colerick*, 3 M. & W. 485), or that they had been stolen from the defendant (*Higgins v. Andrews*, 2 Roll. Abr. 55). Thus, a landlord who starts a pheasant on his own land, and shoots the bird while it is flying over the adjoining land of his neighbour, commits a trespass if he goes on such adjoining land to pick it up (*Osbond v. Meadows*, 12 C. B. N. S. 10—*Addison*). The true owner may retake the goods if he can, even from an innocent third person into whose hands they have come; and he may use whatever force is reasonably necessary for the recaption (*Blade v. Higgs*, 10 C. B. N. S. 713). The owner cannot enter on a third person's land, unless the original taking was felonious; or the goods have been claimed and the occupier of the land has refused to deliver them (*Anthony v. Haney*, 8 Bing. 187).

*Leading case.*—**Anthony v. Haney.**

### 8. *Abating a nuisance.*

Abatement, that is removal of the nuisance by the party injured, must be (1) peaceable, (2) without danger to life or limb, and (3) after notice to remove the same, if it is necessary to enter another's land to abate a nuisance, or where the nuisance is a dwelling house in actual occupation on a common, unless it is unsafe to wait.

### 9. *Special property or easement.*

The grantee of an easement may enter upon the servient tenement in order to do necessary repairs (*Taylor v. Whitehead*, 2 Doug. 745), &c.

10. *Liberum tenementum.*

*Liberum tenementum*, i. e., frank or free tenement. Land may be entered on the ground that it belongs to defendant. This plea is generally pleaded to determine the question of title. This was formerly a usual plea of a defendant in an action of trespass alleging a general freehold title. It is now obsolete.

**Damages.**—In actions for injuries to land, the measure of damages is the diminished value of the property, or of a plaintiff's interest in it, and not the sum which it would take to restore it to its original state. The damages will vary considerably, according to the plaintiff's interest in the land. This is obviously just, both to prevent the plaintiff getting extravagant recompense when his interest is on the point of expiring, or very remote, and to prevent the defendant being forced to pay for the same damage several times over. The same act may give rise to different injuries; the tenant may sue for the injuries to his possession and the landlord for the injuries to his reversion (*Jefferson v. Jefferson*, 3 Lev. 130). And so where several persons are entitled in succession, as tenant for life, in tail, in fee, each can only recover damages commensurate to the injury done to their respective estates (*Evelyn v. Raddish*, Holt N. P. 543).

As to *prospective* damages the rule is that where such prospective loss may be the subject of a fresh action when it occurs, it cannot be allowed for beforehand and *vice versa*. The former is the case when the act complained of is a continuing trespass upon the plaintiff's land, as for instance, an unauthorized erection upon it (*Holmes v. Wilson*, 10 A. & E. 503); or is a continuing nuisance to it (*Shadwell v. Hutchinson*, 4 C. & P. 373). The contrary rule obtains where the original wrong consists of a single in-

jury or act of destruction ; for where the defendant had made an aperture in the plaintiff's mine, through which the water kept continuously flowing into, and drowning it, it was ruled that no fresh action could be brought for loss accruing subsequently. The damages in the first action for making the aperture must be taken to have been a full compensation not only for the act, but for all the consequences which could arise from it (*Clegg v. Dearden*, 12 Q. B. D. 576).

Consequential loss resulting naturally from acts which are in themselves part of the trespass, may be proved as substantial damage, though it might be sued for as a distinct ground of action ; for instance, infection caught by plaintiff's cattle from the entry of diseased cattle into his land (*Anderson v. Buckton*, 1 Stark. 192).

Acts of insult and malice are matters of aggravation, for which substantial or exemplary damages should be given (*Sreehuree Roy v. James Hill*, 9 W. R. 156). The owner out of possession can sue the trespasser for mesne profits without suing for possession (*Dyamoyee Dayee v. Modhoo Soodun*, 3 W. R. 147).

Where the defendants trespassed on the plaintiff's land by tipping spoil thereon from their colliery, it was held that the amount of damages was not to be assessed by ascertaining merely the diminution in value of the plaintiff's land, but that the principle of way-leave cases (*Martin v. Porter*, 5 M. & W. 351 ; *Jegon v. Vivian*, L. R. 6 Ch. 742 ; *Phillips v. Homfrey*, L. R. 6 Ch. 770) applied : namely, that if one person without leave of another uses the other's land for his own purposes he ought to pay for such user ; and that, therefore, as to so much of the land as was covered with spoil, the value of the land for the purpose for which it was used by the wrong-doers ought to be taken into account, and that as to the rest of the land the measure of damages was the diminution of the value thereof to the plaintiffs by reason of the wrongful acts of the defendants (*Whitwham v. Westminster B. Coal & Coke Co.*, (1896) 2 Ch. 538).

*Indian case.*—In a suit brought against the Secretary of State by the plaintiffs the landlords for damages for wrongful invasion of, and injury done to, their lands while in the possession of their tenants by the orders

of the chief local officer. Held, that substantial, but not exemplary or vindictive, damages should be awarded, because damages recovered from the Secretary of State are in truth recovered from the tax-payer who has done the plaintiffs no wrong and the plaintiffs not suing the actual wrongdoers did not leave to Government the discretion of determining how far the damages should be borne by their defaulting officer and how far, if it all, borne by the public, and because the tenants who were in possession were not parties to the suit while trespass was primarily an injury to possession (*Beramji v. Secretary of State*, (1887) P. J. 205).

## 2. *Dispossession.*

Dispossession or ouster is wrongfully taking possession of land from its rightful owner. The word 'dispossession' applies only to cases where the owner of land has, by the act of some person, been deprived altogether of his dominion over the land itself, or the receipt of its profits (*Govind Lal v. Debendro Nath*, 6 Cal. 311). In order to constitute dispossession there must in every case be positive acts, which can be referred only to the intention of acquiring exclusive control (*P. & W.*, 85). A person cannot be dispossessed of immoveable property unless he was possessed thereof at the time.

**Remedy.**—The party dispossessed can bring an action of ejectment to recover possession of the land. The plaintiff is put to proof of his title, for the defendant by virtue of his bare possession has a good title as against all who cannot show a better. Proof that the plaintiff was in possession before the defendant, no matter for how short a time, is *prima evidence* of his having title, for such prior possession raises a presumption that he was seised in fee; but though such presumption cannot be rebutted merely by showing that the plaintiff did not derive his possession from any person who had title (*Doe d. Smith v. Webber*, 1 A. & E. 119; *Allen v. Rivington*, 2 Saund. 111), the weight of authority is in favour of the view that it may be rebutted by showing

that the title is in fact in a third person; to an action of ejectment *jus tertii* is a good defence (*C. & L.*, 310). There are, however, exceptions to this—

(1). Landlord and tenant. The landlord need not prove his title but only the termination of the tenancy. Neither a tenant nor any one claiming under him can dispute the landlord's title. (*Vide* also, Indian Evidence Act, s. 116).

(2). Licensees cannot dispute the title of the persons who licensed them. There is no distinction between the case of a tenant and that of a common licensee. (*Vide* also Indian Evidence Act, s. 116).

When possession at a certain time has been satisfactorily proved, a presumption of possession at an antecedent period may in certain circumstances arise (*Ananga Manjari v. Tripura Sundari*, 14 Cal. 740).

Where the question of possession is doubtful, a presumption will arise in favour of the party who proves title (*Ranjit Ram v. Gobardhan*, 20 W. R. 25; *Mohima Chandra v. Haro Lal*, 3 Cal. 768; *Dharm Singh v. Har Prasad*, 12 Cal. 38).

There is a conflict of opinion\* between the different High Courts as to whether a plaintiff in a suit for possession of immovable property, other than a suit under s. 9 of the Specific Relief Act (I of 1877), is entitled to succeed merely upon proof of previous possession and dispossession by the defendant within twelve years prior to the suit, or whether he is bound to prove title.

A full Bench of the Bombay High Court has held that possession is a good title against all persons except the rightful owner, and entitles the possessor to maintain

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\* See a learned dissertation on this subject in 3 Bom. L. R. J. 110. The same subject is also discussed in 3 Cal. W. N. pp. cclxxiii, ccxcii and 6 Cal W. N. p. ix.

ejection against any other person than such owner who dispossesses him (*Premraj v. Narayan*, 6 Bom. 215; *Sakalchand v. Sunderlal* (1889) P. J., 309; *Krishnacharya v. Lingawa*, 20 Bom. 270; *Ambalal v. Secretary of State*, 1 Bom. L. R. 45; *Basapa v. Basapa*, 2 Bom. L. R. 410; *Bai Fatan v. Emad*, 3 Bom. L. R. 246). "Possession is evidence of title and is primarily exclusive. It is for him who impugns the exclusive title to show that the possession originated in some way which has preserved his own right; otherwise we must attribute a legal origin and the usual incidents to actual, continued and peaceful enjoyment" (*Vithoba v. Narayan* (1883) P. J. 262; followed in *Ramchandra v. Narayan* 11 Bom. 221). Thus, a plaintiff, although suing more than six months after the date of possession and without resorting to a possessory suit (Specific Relief Act, s. 9), is entitled to rely on the possession previous to his dispossession as against a person who has no title (*Krishnarav v. Vasudev*, 8 Bom. 371; *Premraj v. Narayan*, *sup.* followed, and *Dadabhai v. Sub-Collector of Broach*, 7 B. H. C. 82, dissented from). The view of the Bombay High Court is in accordance with the English law (*Asher v. Whitlock*, L. R. 1 Q. B. 1). The effect of the Bombay cases is that when there is wrongful ouster of the person in possession, the person who comes into Court to oust such tortfeasor need not prove more than his possession of the lands in dispute, and that he had been ousted by the defendant, and that the plaintiff's prior possession was *prima facie* evidence of his title. The Privy Council has also decided that lawful possession of land is sufficient evidence of right as owner, as against a person who has no title whatever, and who is a mere trespasser (*Ismail v. Mahomed*, 20 Cal. 834). Recently in the case of *Hanmantrao v. Secretary of State* (2 Bom. L. R. 1111; 25 Bom. 287) Ranade, J., said: "Where the



conflict is between mere previous possession and recent actual possession, the fact of previous possession will not entitle plaintiff to a decree except in suit under section 9, Act I of 1877, brought within six months from dispossession. Where this period is exceeded before a suit is brought, and is less than the limitation law requires, he must make out a *prima facie* title...And section 110 (Evidence Act) refers to the presumption to be made of ownership based on the circumstance of such possession, and allows the plaintiff with such *prima facie* title to claim a decree where no superior title is proved on the other side. It is in reference to such cases that it has been held that possession is evidence of title, and the plaintiff who proves such possession and subsequent disturbance, shifts the burden of proof on the defendant when the *prima facie* title is made out.....Mere *wrongful* possession is insufficient to shift the burden of proof." But this view of Ranade, J., is not explicit enough. In two very recent cases decided after this case, Mr. Justice Batty and Mr. Justice Chandavarkar, fully confirm the principle laid down prior to it. In the first case, Mr. Justice Batty says : "Now prior possession is certainly a ground on which, as *prima facie* evidence of title, a plaintiff may recover possession in the absence of title set up by the defendant eventhough his suit does not fall within section 9 of the Specific Relief Act...But then it must be found not only that the plaintiff's prior possession was within twelve years of suit, but also that it was a juridical possession of the property claimed." In this case the judgment of Ranade, J., is not referred to (*Rajaram v. Nanchand*, 5 Bom. L. R. 225). In the second case, Mr. Justice Chandavarkar said : "The rule of law on which peaceable possession prevails without any evidence of title as against a person without any title is expressed by Lord Campbell in *Jeffries*

v. *G. W. Ry.* (5 E. & B. 802, 806) to be that a person in possession has a good title as against every stranger and that one who dispossesses him, having no title in himself is a wrong-doer and cannot defend himself by showing that the title is in some third person. In such cases proof of previous possession is, without more, evidence of the plaintiff's title to recover from the defendants who are proved to be wrong-doers. There is a difference between such a suit and a suit under section 9 of the Specific Relief Act. In the former the Courts award the claim only when it finds that the plaintiff had peaceable possession before dispossession and that the defendant has no title and is a wrong-doer, the plaintiff's previous possession being in law sufficient proof of his title: in the latter, the Court can only go into the question of dispossession within six months before suit and cannot enquire into the defendant's title" (*Ali v. Pachubibi*, 5 Bom. L. R. 266).

The Calcutta High Court has, on the contrary, held that mere previous possession will not entitle a plaintiff to obtain a decree for recovery of possession except under the Specific Relief Act which entitles him to recover possession if the suit is brought within six months from the date of dispossession (*Ertza Hossein v. Bany Mistry*, 9 Cal. 130). Where the plaintiff merely proves that he has been in possession of the disputed land at some time within twelve years previous to the filing of the plaint, such evidence is not sufficient to throw upon the defendant the burden of proving his title to the land (*Debichurn v. Issur Chunder*, 9 Cal. 39; *Purmeshur v. Brijolall*, 17 Cal. 236). Recently this High Court distinguished the Privy Council decision mentioned above (*Ismail v. Mahomed*) on the ground that what the plaintiff (who was in possession) asked for in that case was a decree declaring his right, and an injunction restraining the defendant from disturbing his

possession, and therefore that case did not apply where a plaintiff was already dispossessed and brought a suit for possession six months after dispossession. The Court held : " In a suit to recover possession brought more than six months after the date of dispossession, the plaintiff must prove title, and mere previous possession for any period short of the statutory period of twelve years cannot be sufficient for the purpose, because, if that were so, anomalous results might arise ; and it would be difficult to determine what should be the relative durations of possession of the plaintiff and the defendant to entitle the former to a decree" (*Nisa Chand v. Kanchiram*, 26 Cal. 584 ; *Shama Churn v. Abdul Kabeer*, 3 Cal. W. N. 158).

The point did not expressly arise in Madras till the decision in *Mustapha Saheb v. Santha Pillai* (23 Mad. 179). But the two learned Judges who decided the case hold contrary opinions. Subrahmaniam Ayyar, J., says that a person who has been ousted by another who has no better right is, with reference to the person so ousting, entitled to recover by virtue of the possession he had held before the ouster even though that possession was without any title. O'Farrell, J., says that where a plaintiff in possession without any title seeks to recover possession of which he has been forcibly deprived by a defendant having a good title, he can only do so under the provisions of section 9 of the Specific Relief Act and not otherwise.

The Allahabad High Court once ruled that " it is usually for a plaintiff who seeks ejectment to prove his title. But where he proves himself to have peaceably enjoyed possession for a considerable time, the person who has recently dispossessed him has to meet the presumption of law that the plaintiff's possession indicates his ownership " (*Lacho v. Har Sahai*, 12 All. 46). But subsequently in a Full Bench case it has held that section 9 of the Spe-

cific Relief Act does not debar a person who has been ousted by a trespasser from the possession of immovable property to which he has merely a possessory title, from bringing a suit in ejectment or his possessory title after the lapse of six months from the date of dispossession (*Wali Ahmad v. Ajudhia Kandu*, 13 All. 537).

**Defences.**—The defences to such suits are mainly two-fold:—(1) that the defendant has a better title than the plaintiff; and (2) prescription, *i. e.*, the defendant having held the immovable property or enjoyed the interest for twelve years and upwards, the plaintiff's title has thereby become extinguished and the defendant has acquired a good title.

**Damages.**—Plaintiff should show the value of the mesne profits received by the adverse occupant; and nominal damages will only be awarded if no evidence is given as to the period during which defendant was in possession (*Ive v. Scott*, 9 Dowl. P. C. 993). Any extra damages for plaintiff's troubles may be given (*Gortille v. Tombs*, 3 Wils. 121).

### 3. *Trespass ab initio.*

When authority, or license, is given to any one by law to enter upon lands or tenements of any person and he abuses it, he becomes a trespasser *ab initio*, *i. e.*, the authority or justification is not only determined, but treated as if it had never existed. His misconduct relates back so as to make his original entry tortious. But where authority is not given by law, but by the party, and abused, then the person abusing such authority is not a trespasser *ab initio*. The reason of the difference being that, in the case of a general authority, or license of law, the law adjudges by the subsequent act with what intention the trespasser entered; but when the party gives an authority or license

himself to do anything, he cannot, for any subsequent cause, punish that which is done by his own authority or license. Besides when the authority is conferred by an individual it can be limited or recalled at will, whereas the rights given by law require to be more strictly protected.

Again the abuse necessary to render a person a trespasser *ab initio* must be a misfeasance and not a nonfeasance (*Six Carpenters' case*, 8 Coke 146).

This doctrine has been applied in modern times to the lord of a manor taking an estray (*Oxley v. Watts*, 1 T. R. 12), and to a sheriff remaining in a house in possession of goods taken in execution for an unreasonably long time (*Ash v. Dawney*, 8 Ex. D. 237). Other instances of trespassers *ab initio* are: the lessor who enters to view waste and *stays all night*; the commoner who enters to view his cattle and *cuts down a tree*; and the man who enters a tavern and *continues there all night against the will of the landlord*.

The leading case of *Six Carpenters* lays down three points—

(1). That if a man abuse an authority given to him by the law, he becomes a trespasser *ab initio*.

(2). That in an action of trespass, if the authority be pleaded the subsequent abuse may be replied.

(3). That a mere *non-feasance* does not amount to such an abuse as renders a man a trespasser *ab initio*.

Six carpenters entered a tavern "and did there buy and drink a quart of wine, and then paid for the same." They then gave a further order for another "quart of wine and a penny-worth of bread, amounting to 8d." This order was also fulfilled. For the second supply the men refused to pay. The question was whether this non-payment made their original entry into the tavern unlawful. The Court held that the men did not become trespassers *ab initio*, because there was a mere non-feasance in refusing to pay (*Vaux v. Newman*, sub-nom. *Six Carpenters' case*, 1 Sm. L. C. 132).

*Leading case.*—The *Six Carpenters' case*, or *Vaux v. Newman*.

4. *Injuries to reversion.*

Whenever any wrongful act is necessarily injurious to the reversion to land, or has actually been injurious to the reversionary interest, the reversioner may sue the wrongdoer (*Beddingfield v. Onslow*, 1 Saund. 322). A reversioner must show that the injury is such as necessarily to damage also his estate, otherwise in fact there is no invasion of his right or interest (*Broom*). A person in possession of property may do wrong by refusing to deliver possession to a person entitled, or by otherwise assuming to deal with the property as owner or adversely to the true owner, or by dealing with it under colour of his real possessory title but in excess of his rights, or, where the nature of the object admits of it, by acts amounting to destruction or total change of character, such as breaking up land by opening mines, burning wood, grinding corn, or spinning cotton into yarn, which acts however are only the extreme exercise of assumed dominion (*Pollock*, 335).

The owner of a life estate or interest is not allowed to destroy, consume, or otherwise permanently impair the *corpus* or substance of the subject thing, so as thereby to leave it to the remainderman or the reversioner in a worse state than it would otherwise have been left. He has only an usufructuary property in the thing (*Mitchell*).

It is, however, important to note the difference between an action for a **trespass to land** and an action for damage done to the reversion. In the former action special damage need not be proved with a view to supporting it. In the latter action, it must be so ; that is to say, a plaintiff suing as reversioner must show that, by the acts complained of, his reversionary estate and interest were depreciated or lessened in value or he must show that the alleged tort was of a kind necessarily calculated to prejudice the reversion (*Dobson v. Blackmore*, 9 Q. B. D. 991).

Opening a new door in a house may be an injury to the reversion, even though the house is none the worse for the alteration; for the alteration of property may be injury (*Young v. Spencer*, 10 B. & C. 145). Obstruction of an incorporeal right, as of way, air, light, water, &c., may be an injury to the reversion (*Kidgill v. Moor*, 9 C. B. 364; *Met. Ass. Co. v. Petch*, 27 L. J. C. P. 330; *Greenslade v. Halliday*, 6 Bing. 379).

### 5. *Waste.*

Waste is "the committing of any appreciable spoil or destruction to any corporeal hereditament, by a tenant during his particular estate therein, to the damage of the heir, or of him in reversion or remainder contrary to the obvious intention of the grantor" (*Garth v. Hind Cotton*, W. & T.'s L. C. ii, 1000; *Dashwood v. Magnaic*, (1891) 3 Ch. 352). It is a spoil or destruction of houses, gardens, trees, or other corporeal hereditaments, to the dispersion of him that hath the remainder or reversion (*Blackstone*). Some act or omission prejudicial to inheritance is essential upon which to ground an action for waste. The injury to the inheritance must be either (1) by materially diminishing the value of the estate; or (2) by increasing the burden upon it; or (3) by impairing the evidence of title (*Harrow School v. Alderton*, 2 B. & P. 86; *Doe v. Earl of Barlington*, 5 B. & A. 507, 517; *Jones v. Chappell*, L. R. 20 Eq. 539; *Tucker v. Linger*, 21 Ch. D. 18; 8 App. Cas. 508; *Lord Darcy v. Askwith*, Hob. 234; *West Ham. Cen. Cha. Board v. East London Waterworks Co.*, (1900) 1 Ch. 624).

Before the fusion of law and equity by the Judicature Act, 1873, the divisions and sub-divisions of waste were as follows:—

1. Legal waste, being either (a) voluntary waste; or (b) permissive waste.
2. Equitable waste, which was in all cases voluntary, and so is described as equitable waste only.

1. **Legal waste** is a term used to describe waste for which there lay a remedy *at law*.

(a) *Voluntary legal waste* is a crime of commission, or it consists in the active doing of something.

For example, pulling down houses, pulling down wainscots, doors, windows, furnaces, and other such fixtures, causing timber trees to decay, stubbing up underwood, cutting down fruit trees in an orchard, cutting down trees which shelter the mansion; also opening new gravel pits, lime pits, clay pits, &c., or new mines of metal, coal, and the like; also the conversion of old meadow-land into arable, or of arable into plantation, or the like, and even ploughing up a rabbit warren, or reclaiming deer in a park, or altering the character of a building.

(b) *Permissive legal waste* is a matter of omission only, or it consists of a mere passive act, *e. g.*, allowing a house to go to rack and ruin by reason of non-repair.

2. **Equitable waste** consisted in "malicious, extravagant, or humorsome" acts of destruction on the part of a tenant who was not impeachable for waste at law. Equitable waste is such as cannot be imputed to any fair acts of ownership, but is destructive of the property itself (*Arabal v. Bubb*, 9 Freem. 54). It came to be called equitable, because if a tenant for life or other qualified owner was entitled to do all ordinary acts of ownership, there was at law no remedy to prevent an abuse of this right and so Courts of Equity had to interfere to prevent the unconscientious abuse of a legal right (*Baker v. Sebright*, 13 Ch. D. 185).

For example, where a tenant for life without impeachment of waste, pulls down or dismantles, without any proper purpose, the mansion house (*Vane v. Lord Barnard*, 2 Vern. 738), or pulls down farm houses (*Aston v. Aston*, 1 Ves. 265), or totally destroys a plantation, or fells ornamental timber; or, again, where the tenant in tail after possibility of issue extinct commits the like acts of waste (*Att.-Gen. v. Duke of Marlborough*, 3 Madd. 538); or again where a devisee in fee simple with an executory devise over on his death without leaving issue or any other event, does the like acts of waste (*Turner v. Wright*, 1 Johns. 740); or again where a tenant in possession under a disputed title does the like acts of waste (*Earl Talbot v. Hope Scott*, 4 K. & J. 96).



*Indian case.*—Laying a drain in land and the incidental interference with the soil necessary for that purpose cannot be regarded as an ouster or destruction or an act of waste, and will not entitle a tenant-in-common of the land to maintain an action against another tenant-in-common (*Mohan-chand v. Isakbhai*, 2 Bom. L. R. 898 ; 25 Bom. 248).

But by the Judicature Act the jurisdiction of the Court to interfere to prevent equitable waste seems to be rested upon a new ground, namely, the presumption of absence of intention on the part of the settlor to confer a right to commit it.

**Liability.**—Tenants for life, for years, at will, and at sufferance, are liable for waste. But in the absence of an express covenant or an obligation not to commit waste imposed by the instrument creating the estate, neither a tenant for life, nor a tenant at will, is liable for permissive waste.

A tenant in fee simple is not liable for waste ; nor is a tenant in tail, because he can at any time bar the entail, and make himself tenant in fee simple ; but a tenant in tail, after possibility of issue extinct, is liable for equitable waste, inasmuch as he cannot bar the entail (*Fraser*, 67).

A tenant for life of leaseholds is not liable to the remainderman for permissive waste (*In re Parry &c.*, (1900) 1 Ch. 160).

*Indian law.*—In India, actions for waste is generally by reversioners against Hindu widows (*Budhun v. Fazloor*, 9 W. R. 362 ; *Maharani v. Nundolal*, 1 B. L. R. A. C. J. 27 : 10 W. R. 73 ; *Gobindmani v. Shamlal*, B. L. R. SUP. VOL. 48 ; *Shama Soonduree v. Jumona*, 24 W. R. 86 ; *Hurry Doss v. Shreemuthy*, 6 M. I. A. 433 ; *Lalsundar v. Hari Krishna*, Marsh. 113 ; Hay 339).

Action for waste must generally be brought by the person next entitled in remainder ; and, if the latter has only a little estate, he is only entitled to such damages as are commensurate with the injury done to his life estate.

It is no answer to an action of waste to say that the value of the property is enhanced by the changes made. The lessor is entitled to have the premises kept in the state in which he demised them.

**Damages and injunction.**—In an action for waste the actual damage sustained may be recovered and an injunction obtained against the recurrence of the mischief. The right of injunction against waste may be lost by long delay and practical acquiescence. To obtain an injunction the plaintiff must prove that what the defendant is doing is prejudicial to the inheritance; if it improves the value of the land it is not waste (*Meux v. Cobley*, (1892) 2 Ch. 253).

#### 6. *Wrongs to easement.*

Of easements, says Goddard, there are two kinds similar to one another in many respects, but differing materially in many important particulars. One kind consists of easements created at the will of a land-owner affected by them for the benefit of a neighbour, and the other of easements given by law to every owner of land, irrespectively of the will of those who may have to bear their burden of them.

The latter rights are inherent in the land *ex jure naturae* (of natural right) and are usually called "Natural Rights." They are given by law to every owner of land, irrespectively of any grant by the servient owner, as without them no man would be sure that his land would not, at any time, be rendered useless by his neighbour's otherwise lawful act. They are given for mutual security and therefore from motives of public policy. They are rights for the injury to which an adjoining proprietor is responsible upon the principle *sic utere tuo ut alienum non laedas*. The purpose of Natural Rights is to secure necessary support for land from the adjacent and subjacent soil, and the due

enjoyment of air, light, and water, which, by the provision of nature, flow over the soil of one land-owner to that of another for the common benefit of each. Though Natural Rights are a species of easements, the expression 'easement' is commonly used exclusively to denote the first class of easements (*i. e.*, easements created at the will of a land-owner affected by them); while the second class of easements (*i. e.*, those created by operation of law) are known as Natural Rights.

Easements are distinguished from Natural Rights, inasmuch as the former are founded upon (1) prescription, or (2) a grant, express; or implied; whereas the latter are incident to the possession of realty. The most ordinary instances of easements are the rights of air or light, of way, and of artificial watercourses. Incident to the property in land is the right to the air or light from above it; but a right to receive light or air from across a neighbour's property may be acquired, so that nothing can be done thereupon, as by building, &c., substantially to interfere with that right.

When easement has once been acquired, it will stand upon the same footing as a Natural Right of property and any infringement thereof will be punished at law either by damages for the unlawful acts, or an injunction to prevent their repetition.

The most important Natural Rights and Acquired Rights (Easements) of property, the invasion of which are treated as wrongs, are :—

1. Right to support of—
  - (1) Land by land.
    - (a) Lateral support.
    - (b) Vertical support.
  - (2) Buildings by land.
  - (3) Buildings by buildings.
  - (4) Land and buildings by water.

2. Riparian rights.
  - (1) Surface water.
    - (a) Natural streams.
    - (b) Water standing on the soil or not flowing in a defined channel.
    - (c) Artificial watercourses.
  - (2) Subterranean water.
    - (a) Subterranean streams the courses of which are well known and clearly defined.
    - (b) Subterranean streams the courses of which are undefined.
    - (c) Percolating water, the course of which is underground, undefined and unknown.
3. Right to free access of light and air.
4. Right of way.
  - (1) Public rights of way.
  - (2) Rights of way belonging to a certain class of persons.
  - (3) Private rights of way : for
    - (a) General purposes :
    - (b) Foot passengers ; and
    - (c) Sweepers.
5. Right of Privacy.

#### I RIGHT TO SUPPORT.

It may be useful to remember that the right to support referred to in all the following cases is quite independent of any question of *negligence*.

##### (1). *Support of land by land*

Support of land by land may be either :—

- (a). The lateral support of land by adjacent land, or
- (b). The vertical support of the surface by the sub-soil, where the property in the two is distinct.

(a). **Lateral support.**—Every proprietor of land is entitled of common right to such an amount of lateral support from the adjoining land of his neighbour as is necessary to sustain his own land in its natural state, not being weighted by walls or buildings (*Humphries v. Brogden*, 12 Q. B. D. 744 ; *Hunt v. Peak*, 29 L. J. Ch. 785).

If the land has been weighted by superstructure, the land-owner who has thus weighted his land is not entitled *ex jure naturae*, to the additional support from his neighbour's soil necessary for the maintenance of the building; for one land-owner cannot, by altering the natural condition of his land by erecting buildings thereon, deprive his neighbour of the privilege of using his land as he might have done before (*Wyatt v. Harrison*, 3 B. & Ad. 875; *Partridge v. Scott*, 3 M. & W. 220). This right to lateral support is not an absolute right; and the infringement of it is not a cause of action without appreciable damage (*Smith v. Thackerah*, L. R. 1 C. P. 564). But a right of support in extension of the Natural Right may be acquired by prescription or grant. The right of support may be destroyed or prevented from arising by covenant, grant, or reservation, but the language of the instrument must be clear and unambiguous (*Rowbotham v. Wilson*, 8 H. L. C. 48; *Aspdon v. Seddon*, L. R. 10 Ch. Ap. 394).

Where A dug a well near B's land, which sank in consequence and a building erected on it within twenty years fell, and it was proved that, if the building had not been on B's land, the land would still have sunk, but the damage to B would have been *inappreciable*, it was held that B had no right of action against A (*Smith v. Thackerah*, L. R. 1 C. P. 564). Where between the land of the plaintiff and that of the defendants there was such an extent of intermediate land as would, if undisturbed, have sufficed to afford the requisite support to the plaintiff's land, but the coal under such intermediate land had been worked out before by some third party, in consequence whereof, when the defendants worked the coal under their own land, subsidence was caused in the surface of the plaintiff's land, it was held that the plaintiff had no right of action against the defendants (*Mayor &c. of Birmingham v. Allen*, 6 Ch. D. 284; *Greenwell v. Low Beechburn Coal Co.*, (1897) 2 Q. B. 165).

*Leading case.*—**Smith v. Thackerah.**

(b). **Vertical support.**—There also exists a right of support of land by subjacent land, when the surface and subsoil are vested in different owners (*Humphries v. Brog-*

*den*, 12 Q. B. D. 739). The owner of the surface is entitled of common right to the support of the subjacent strata, so that the owner of the subsoil and minerals cannot lawfully remove them, without leaving support sufficient to maintain the surface in its natural state (*ibid*). If the owner of the land grants the sub-soil, reserving the surface to himself, he impliedly grants reasonable means of access to the sub-soil, and the grantee would have a right to go upon and dig through the surface, to enable him to reach the sub-soil, if he had no other means of access thereto. But the owner of the sub-soil may maintain an action against the owner of the surface, if he digs holes into the sub-soil to a greater extent than is reasonably necessary for the proper and fair use, cultivation and enjoyment of the surface; or if he removes so much of the surface that the mines below are flooded (*Cox v. Glue*, 5 C. B. 551).

If the owner of the sub-soil excavates it without leaving proper support for the surface, the owner of the surface has no right of action until some actual damage has been sustained by him (*Backhouse v. Bonomi*, 9 H. L. C. 503; Act V of 1882, s. 34). But proof of pecuniary loss is not necessary if actual subsidence is proved (*Att.-General v. Conduit Colliery Co.*, (1895) 1 Q. B. 301).

A right to trench upon these natural rights of support, as to work so as to cause a subsidence, may exist by clear express grant, or be acquired by a sufficient long user as of right (*Rowbotham v. Wilson*, 6 H. L. C. 348).

## (2) *Support of buildings by land.*

Support of buildings by land may be either :—

(a) The support of buildings laterally by adjacent soil ; or

(b) The support of buildings vertically by subjacent soil.

The natural right to support exists in respect of land only, and not in respect of buildings; but a right to support for buildings, both from adjacent and subjacent land, may be acquired as an easement.

The right to support of land artificially burdened may be acquired by—

(1). Grant, which may be (a) express; or (b) implied, *e. g.*, as where a man granted part of his land for building (*Rigby v. Bennet*, 21 Ch. D. 559).

(2). Prescription. In the leading case of *Angus v. Dalton*, (6 App. Cas. 740), it is laid down that a right to lateral support from adjoining land may be acquired by twenty years' uninterrupted enjoyment for a building proved to have been newly built, or altered so as to increase the lateral pressure, at the beginning of the time; and that it is so acquired if the enjoyment is peaceable and without deception or concealment, and so open that it must be known that some support is being enjoyed by the building.

Where a corporation sold a piece of land for building purposes, and the plaintiff to the knowledge of the corporation, dug his foundation to a depth of eight feet and built his house up to the ground floor, and eleven months afterwards the defendants purchased from the corporation the adjoining lot, and carried their foundations lower than those of the plaintiff, it was held that he was entitled to restrain the defendants from excavating so as to let down his house (*Rigby v. Bennett*, 21 Ch. D. 559). Two dwelling houses adjoined, built independently, but each on the extremity of its owner's soil, and having lateral support from the soil on which the other rested. This having continued for more than twenty years, one of the houses (plaintiff's) was converted into a coach factory, the internal walls being removed and girders inserted into a stack of brick-work in such a way as to throw more lateral pressure than before upon the soil under the adjoining house. The conversion was made openly and without deception or concealment. More than twenty years after the conversion the owners of the adjoining house employed a contractor to pull down their house and excavate, the contractor being bound to shore up adjoining buildings and make good all damage. The house was pulled down, and the soil under it excavated to a depth of

several feet, and the plaintiffs' stack being deprived of the lateral support of the adjacent soil sank and fell, bringing down with it most of the factory. Held, that the plaintiffs had acquired a right of support for their factory by the twenty years' enjoyment, and could sue the owners of the adjoining house and the contractor for the injury (*Dalton v. Angus*, 6 App. Cas. 740; *Bower v. Peat* approved).

*Indian case.*—S owned a house, which had stood for sixteen years only, on a piece of land adjoining his land. M, for the purpose of building a house on his said land, laid the foundations. S's land then gave way, thereby causing injury to his house. For this injury he sued M for damages, alleging negligence on the part of M in sinking the foundations of his house. On the evidence the Court found that the ultimate cause of the collapse of the ground under S's house was one which was beyond the reach of M. Held that, at highest, S had as against M, a natural right of support to his land, but no right whatever in respect of the buildings imposed on it, unless and until they had been there for twenty years, when an easement of support would be acquired under the Indian Easements Act, 1882; and that the only damages which S could claim would be in respect of the infringement of the right to support of his land. Held, further that before he could recover in respect of the withdrawal of the support of his land, he would have to show that the defendant's negligence was the decisive cause of the giving way of the land (*Sheikh Yacoob v. Moungh Ohu Ghine*, 7 Burma L. R. 1).

*Leading case.*—*Angus v. Dalton*.

### 3. *Support of buildings by buildings.*

Where two houses, erected by different owners, stand in juxtaposition, they in fact stand each on its own ground, and there is no right of support for the one by the other, and it will not necessarily be presumed to have been acquired however ancient the houses. It may, of course, exist by an express grant. That in fact one house leans on the other does not alter the case; there can properly be no user of right unless openly and evidently; and it used to be said that a man by building a weak house cannot impose a duty upon his neighbour, or drive him to pull down his own house or bring an action within a fixed period (*Solomon v. Vinters Co.*, 4 H. & N. 585—*Collett*).



But the mere fact of contiguity of buildings imposes an obligation on the owners to use due care and skill in removing one building not to damage the other, even though no right to support has been acquired (*Dodd v. Holme*, 1 A. & E. 493); but there is no obligation, in the absence of statutory provisions, upon the owner of the building about to be removed to shore up the other building (*Peyton v. Mayor &c. of London*, 9 B. & C. 725), or to give the owner of the other building notice of the intention to remove his own (*Chadwick v. Trower*, 6 Bing. N. C. 1). Although the fact of contiguity of buildings raises an obligation to use care and skill in removing one not to injure the other, that obligation cannot arise if, from the circumstances of the latter building being underground or otherwise, the party removing the former has no notice of its existence; for one degree of care would be required where no vault or building exists and the soil is left in its natural and solid state, another where there is a vault, and another and still greater degree of care would be required where the adjoining vault is of a weak and fragile construction (*Chadwick v. Trower*, 6 Bing. N. C. 1), and it would be impossible to ascertain the precise degree of care required in the absence of notice of the existence of the building (*Godard*, 70).

If one man builds two or more houses, each needs the support of the other, and then if he sells one, it is presumed that he reserves for himself and grants to the buyer, the right of mutual support; and so, if he sells several such houses to several persons at different times, each has the same right of support, with regard to the priority of titles (*Richards v. Rose*, 9 Ex. D. 218; *Howarth v. Armstrong*, 77 L. T. 62).

The right established in *Dalton v. Angus* to a right of support for an ancient building by the adjacent land,

equally applies to support enjoyed from an adjacent building, eventhough both buildings were erected by different owners (*Lemaitre v. Davis*, 19 Ch. D. 281).

Thus, if land not granted expressly for building purposes is weighted with buildings, the owner of the surface has no right to additional support necessary for the maintenance of the buildings until he has acquired the right by grant or prescription; so that if the owner of the sub-soil in working mines leaves sufficient support for the surface, but the land sinks in consequence of the weight of the buildings that have been placed upon it, the owner of the sub-soil is not responsible for the damage done (*Backhouse v. Bonomi*, 9 H. L. C. 503). But, if the weight of the buildings has in no way caused the sinking of the land, and the land would have fallen in *whether buildings had been erected on it or not*, the building on the land becomes quite immaterial, and the defendant is responsible in damages to the extent of the injury done to both houses and land (*Brown v. Robins*, 4 H. & N. 191). For he will have committed a wrongful act (*viz.*, an act causing the subsidence of his neighbour's land), and will consequently be liable for all damages which might reasonably have been anticipated as the consequence of that act (*Stroyen v. Knowles*, 6 H. & N. 454).

Damage is necessary to give a right of action (*Backhouse v. Bonomi*, *sup.* See also Act V of 1882, s. 34).

Three contiguous houses in a street visibly leaned out of the perpendicular for upwards of thirty years, A's house leaning on B's. On the expiration of a lease to a tenant, B took down his house, the effect of which, by removing the support, was to cause C's house to fall down; and C's house falling, A's house fell. Held, that the fall of A's house did not give him a right of action against B, for A had not either a natural or an acquired right to have his house supported by B's through the intermediate house (*Solomon v. Finter's Co.*, 4 H. & N. 585; see *Latimer v. Official Co-operative Society*, 16 L. R. Ir. 305).

4. *Support of land and buildings by water.*

An owner of land has no right at Common law to the support of subterranean water. The right of vertical support does not extend to have the support of any underground water which may be in the soil, so as to prevent the adjoining owner from draining his soil if for any reason it becomes necessary or convenient for for him to do so, the presence of the water in the soil being an accidental circumstance, the continuance of which the land-owner has no right to count upon (*Elliot v. N. E. Ry.*, 10 H. L. C. 359; *Popplewell v. Hodgkinson*, L. R. 1 Ex. 148). It is possible that a right to such support as an easement might be acquired.

Some cottages were built on land of a wet and spongy character, the land not having been properly drained; the adjoining land was sold for the purpose of erecting a church, and on excavation for the foundations, the water was drawn from the spongy land, the surface subsided and cracked, and damage ensued to the cottages. Held, that there was nothing at Common law to prevent the owner of land draining his soil if it was necessary or convenient for him to do so, though he might by grant, express or implied, oblige himself to suffer the underground water to remain (*Popplewell v. Hodgkinson*, *sup.*). But, where the plaintiff's land was supported, not by a stratum of water, but by a bed of wet sand or running silt, and the defendants caused the subsidence of the plaintiff's land by withdrawing this support, it was held that they were liable. The above case of *Popplewell v. Hodgkinson* was held not applicable as it dealt only with support by water (*Jordeson v. Sutton &c. Co.*, (1899) 2 Ch. 217). Where the defendants by removing the lateral support of their land caused the asphalt or pitch which formed the main ingredient of the plaintiffs' land to melt and ooze forth into their own land and thereupon appropriated it to their own use; it was held that an injunction was rightly granted to restrain them, and that damages were recoverable both for injury caused by subsidence of the plaintiffs' surface and for loss of the pitch. The case of *Popplewell v. Hodgkinson* was held not applicable as the underground stratum common to both lands was not water but natural pitch (*Trinidad Asphalt Co. v. Ambard*, (1899) A. C. 594).

## 2. RIPARIAN RIGHTS.

The term 'riparian' is derived from the Latin word '*ripa*,' which signifies a bank of a river or stream in general, and includes the bank of an artificial stream. Hence, the expression 'riparian land' means land, which is on the bank of, or, to use perhaps a more accurate phrase, which abuts on a stream, either natural or artificial. A riparian proprietor is the proprietor of riparian land; but the phrase, 'riparian rights' denotes exclusively that group of Natural Rights, which reside in a riparian proprietor, or are incident and inseparably annexed to his ownership of riparian land, abutting on a natural stream only; as distinguished from easements or acquired rights (derived by grant, covenant, prescription, or statute) which a riparian proprietor may have in a stream, either natural or artificial. The expression 'riparian rights' is large enough to embrace all natural rights annexed to lands which border on a river through the whole length of its course, both below and above the tide (*Lal Mohun Doss*). Riparian owners have the same natural riparian rights in public navigable and tidal rivers as in private streams (*Lyon v. The Fish Mongers Co.*, 1 App. Cas., 662).

The law as to riparian owners is the same in India as in England, and is stated in illustration (h) of section 7 of the Easements Act, V of 1882 (*Narayan v. Keshav*, 23 Bom. 506).

(1). *Surface water.*

(a) **Natural water-courses or streams.**—The word '*water-course*' in its strict etymological sense means the bed or channel through which a stream of water flows, but in law it also denotes the stream itself as it flows in the channel and a right of easement in connection with the

water (per Chatterji, J., in *Collins v. Ten Broeke*, P. R. 71 of 1896).

A 'natural stream' is one which arises at its source from natural causes, and flows in a natural channel (*Godard*). The word 'stream' in its primary and natural sense, denotes a body of water having, as such body, a continuous flow in one direction (per Lord Watson, in *M'Nab v. Robertson*, (1897) A. C. 134). Water percolating discontinuously through or along strata cannot be described as a stream (*M'Nab v. Robertson*, (1897) A. C. 129). Every riparian proprietor is deemed in law to own the soil up to the centre of the river, and if he interferes with it beyond that point he commits a trespass. Of the water itself there is no separate ownership; being a moving and passing body, there can be no property in it. But every landowner has a natural right to the uninterrupted flow, without diminution, deterioration in quality, or alteration, of the water of natural surface streams which pass to his lands in defined channels, and to transmit the water to the land of other persons in its accustomed course (*Sury v. Pigot*, Poph. 166; *John Young & Co. v. Bankies D. Co.*, (1893) A. C. 691; *Debi Pershad Singh v. Joynath*, 24 Cal. 865, P. C.). Riparian owners are entitled to use and consume the water of the stream for drinking and household purposes, for watering their cattle, for irrigating their land, and for purposes of manufacture; subject to the conditions that—

- (1) the use is reasonable,
- (2) it is required for their purposes as owners of the land, and

- (3) it does not destroy or render useless, or materially diminish, or affect the application of the water by riparian owners below the stream in the exercise either of natural right or their right of easement, if any (*Perumal v.*

*Ramasami*, 11 Mad. 16; *Sheikh Monoour v. Kanhya*, 3 W. R. 218; *Athur Ali v. Sekunder*, 4 W. R. 28; *Sardawan v. Hurbuns*, 11 W. R. 254; *Embray v. Owen*, 6 Ex. D. 353).

He who first applies running water to irrigation or other purposes, does not thereby acquire an extended right, as against others, until his enjoyment has been long enough to give him a title by prescription (*Buddhun v. Shunker*, (1864) W. R. 106); but, till then, the right is only to the natural use, which must be such as not essentially to destroy the natural flow to the damage of those *above or below* him (*Miner v. Gilmour*, 12 M. P. C. 156). Each proprietor has a right to a reasonable use of the water as it passes his land, but, in the absence of some special custom, he has no right to dam it back or exhaust it, so as to deprive other riparian owners of like use (*Narayan v. Keshav*, *sup.*; *Chumroo Singh v. Mullick Khyrut*, 18 W. R. 525; *Heera-nand v. Khubeeroonissa*, 15 W. R. 516).

A right to pollute a natural stream may be acquired by grant or prescription, though such enjoyment, or any other kind of enjoyment in excess of the natural right, will not begin to be adverse and of right, until the injurious effect is suffered; for, at first, or for many years the deposit or other user, resulting in damage, may have been imperceptible (*Murgatroyd v. Robinson*, 7 E. & B. 391; *Simpson v. Hoddinot*, 1 C. B. N. S. 611). A riparian proprietor who has a prescriptive right to take, in a particular way and at a particular place, water from a river and to return such water to the river in a polluted condition, is not entitled to take the water in any other way or place, nor use even his Common law right of taking it in such a way as to add to the pollution of the stream (*McIntyre Bros. v. McGavin*, (1893) A. C. 268).

If the rights of a riparian proprietor are interfered with, as by diverting the stream, or abstracting, or fouling the

water, or by cutting him off from a navigable tidal river, or by embanking the foreshore, he may maintain an action against the wrong-doer, eventhough he may not be able to prove that he has suffered any actual loss (*Wood v. Waud*, 3 Ex. D. 748; *Embrey v. Owen*, 6 Ex. D. 369; *Shunker v. Gurbhoo*, 15 W. R. 216).

An upper riparian owner has no right to an injunction to restrain a lower riparian owner from obstructing the flow of water in the stream unless he can show either present damage or probable damage in the future (*Jeremiah Ambler & Sons v. The Corporation of Bradford*, 18 T. L. R. 758; *Shama Churn v. Boido Nath*, 11 W. R. 2; *Ram Chund v. Nuddiar*, 23 W. R. 230).

Where the defendant company supplied their engines and station with water from the plaintiff's stream, the plaintiff, a mill-owner, sued for an injunction and compensation; it was held that as there was no damage caused in wet weather, and the working of the mill was never in any case shortened by more than a few minutes a day, the defendant company was not liable (*Sandwich v. G. N. Ry.*, 10 Ch. D. 707). Where a non-riparian owner, with the license of a riparian owner, took water from a river, and after using it for cooling certain apparatus, returned it undiminished in quantity and unpolluted in quality; it was held that a lower riparian owner had no right of action, for his right to have the water undiminished in quantity and undefiled in quality was not infringed (*Kensit v. G. E. Ry.*, 27 Ch. D. 122). A mine owner is not, apart from contract or prescriptive right, entitled to pump water into a stream, though the water may not make the stream unfit for ordinary purposes but only for some special purpose, *e. g.*, distilling whisky (*Young & Co. v. Bankier Distillery Co.*, (1893) A. C. 691).

*Indian cases.*—A dam had been in existence across a river for upwards of 280 years, and during all that time the villages of D and P had received an equal supply of water from separate sluices in the dam. The Government authorities, being of opinion that D required less water than P, reduced the size of the D sluice, and consequently the amount of water flowing to the D village. The inhabitants of D appealed against the action of Government. Held, that the Government had no such right of interference, neither (1) as riparian proprietors (supposing them to be such), since the right to the enjoyment of the water of a river belongs to the occupant of the river-bank, whatever be the nature of his tenancy; nor (2) by any other imaginable rights

existing in the Government as such, since if any such rights ever existed, the long user for upwards of 280 years of the water from the dam by the village of D would be amply sufficient to justify a presumption of an original *animus dedicandi* in the Government (*Collector of Nassik v. Shamji Dasrath*, 7 Bom. 209). The owners of a tank fed by natural streams, which depended for their supply on natural rainfall and surface water, sued for an injunction to restrain superior riparian owners from damming the streams or interfering with the supply of water, over which the plaintiffs claimed a right of easement. Held, that an easement can be acquired in regard to the water of the rainfall: but surface water not flowing in a stream and not permanently collected in a pool, tank, or otherwise is not a subject of easement by prescription though it may be the subject of an express grant or contract. It is the natural right of every owner of land to collect or dispose of all water on the surface which does not pass in a defined channel (*Perumal v. Kamasami*, 11 Mad. 16). A claim to demolish an embankment erected by a person on his own land which intercepts the natural flow of water on to the land of another, cannot be maintained by the other so long as a reasonable and fair quantity of water is allowed to pass (*Wazeera v. Sipadar Khan*, P. R. 33 of 1867). A right of easement may be acquired in the surplus water of a tank flowing through a defined channel, whether natural or artificial (*Rayappan v. Virabhadra*, 7 Mad. 530). The appellants placed within the limits of their own estate a dam across a natural stream flowing through their estate on to that of the respondents and diverted the water into a new channel leading to a *tal* or reservoir of their own. The respondents destroyed this dam and the appellants then brought the present suit for a declaration "that the plaintiffs are entitled to carry the water of the river to their reservoir by placing bunds at any part of the river within the estate of the plaintiffs and that the defendants have no right to obstruct or oppose them." The plaint contained no averment or proof either as to the size and character of the dam or as to the quantity which it had the effect of diverting and did not state that the dam did not materially diminish the flow of the stream. Held, that the right as alleged and claimed in the plaint was excessive and could not be allowed (*Debi Pershad Singh v. Joy Nath Singh*, 28 Cal. 865, P. C.).

(b). **Still water.**—The right to surface water standing on the soil, or not running in a defined channel, is in the owner of the soil (see *Rawstron v. Taylor*, 25 L. J. Ex. 31; *Broadbent v. Ramsbotham*, 35 L. J. Ex. 115; *Robinson v. Ayya*, *Maniyam v. Ayya*, 7 M. H. C. 37).

**Artificial water-courses.**—An artificial stream is one that arises by the agency of man, or though arising from



natural causes, flows in a channel made by man (*Goddard*). An artificial water-course may have been originally made under such circumstances, and have been so used as to give to the owners on each side all the rights which a riparian proprietor would have had if it had been a natural stream. The law governing artificial water-courses depends upon whether they are of a *permanent* or *temporary* character, and upon the *circumstances* under which they were created. If an artificial stream is *permanent* in its character, a right to an uninterrupted flow of water may be acquired by prescription or grant against both the originator of the stream, and also against any person over whose land the water flows (*Sutcliffe v. Booth*, 32 L. J. Q. B. 136; *Holker v. Porrit*, L. R. 10 Ex. 59); but long enjoyment of an artificial stream will not give a right to the unobstructed use of a stream obviously made for temporary purposes, as to drain a mine (*Arkwright v. Gell*, 5 M. & W. 203; *Wood v. Waud*, 3 Ex. 748—*Fraser*, 60). With regard to water-courses although artificial, there seems no reason to doubt that the long continued submission of the servient owner to the discharge of water upon his tenement, or to the conducting of it through his land by the owner of the dominant tenement, will confer the right to continue the discharge of the water, or to continue to receive the supply of it, through the land of the servient owner (*Gale*, 269).

The right which a riparian proprietor has, under certain restrictions, to the use of the water of a natural water-course, has no application to a water-course, artificially constructed, and the mere fact of riparian proprietorship gives no rights whatever over such a stream (*Bhoop Narain v. Keramat Ali*, 6 W. R. 99). There is no right to tap an artificial water-course unless by grant or prescription (*Run Bahadoor v. Poodhee* (1864) W. R. 319; *Buddun Thakoor v. Shunker Doss* (1864) W. R. 106).

If a steam-engine or sough is constructed and used by the owner of a mine to drain it, and the water pumped up by the engine, or collected by the sough, flows in a channel to the estate of the adjoining landowner, and is there used for agricultural purposes for twenty years, no right to the water in perpetuity can be gained from any such user, so as to burthen the owner of the mine and his assigns with the obligation of keeping up the steam-engine or a sough, and pumping or collecting water for the benefit of the adjoining landowners. In cases of this sort no right is acquired as against the owner of the property from which the course of water takes its origin, though as between the first and any subsequent appropriator of the water-course itself such a right may be acquired (*Arkwright v. Gell*, 5 M. & W. 232). If a farmer, by some system of drainage, draws off the rainfall from his lands, and pours it into the plaintiff's ditch, and so creates a new and artificial supply of water, and the latter uses the water for more than twenty years, and after that the farmer adopts a new mode of drainage, and in so doing cuts off the artificial supply of water, the plaintiff has no remedy for the loss of water, the supply being of a temporary character, and in the circumstances showing that one party never intended to give, nor the other to enjoy, the use of the artificial drainage water, as a matter of right (*Greatrex v. Hayward*, 8 Ex. D. 291).

*Indian cases.*—Water falling on A's land and collected in a reservoir there, used to flow on to B's land. Held, that B had no right to the use of the water, and that A was entitled to erect on his own land a bund to prevent the water flowing on to B's land (*Bunsee Sahoo v. Kalee Per-hal*, 13 W. R. 414; *Ramesur Persad v. Koonj Behary*, 4 Cal. 633, P. C.).

## (2). *Subterranean water.*

(a) Subterranean streams the courses of which are known and clearly defined.

(b) Subterranean streams the courses of which are undefined.

(c) Percolating water the course of which is underground, undefined and unknown.

(a) The law as to a **subterranean stream**, the course of which is well known and clearly defined, is similar to that of natural streams flowing above ground (*Dadden v. Clutton Union*, 1 H. & N. 630). If the course of a subterranean stream were well known—as where a stream sinks underground, pursues for a short space a subterranean course,

and then emerges again—the owner of the soil under which the stream flowed could maintain an action for the diversion of it, if it took place under such circumstances as would have enabled him to recover if the stream had been wholly above ground (*ibid*). If underground water flows in a defined channel into a well supplying a stream above-ground, but the existence and course of that channel are not known and cannot be ascertained except by excavation, the lower riparian proprietors on the banks of the stream have no right of action for the abstraction of the underground water (*Bradford Corporation v. Ferrand*, (1902) 2 Ch. 655).

(b) (c). Water percolating discontinuously through or along strata cannot be described as a 'stream' (*M'Nab v. Robertson*, (1897) A. C. 129). There is no Natural Right to the uninterrupted flow of such streams (*Goddard*, 326; *Acton v. Blundell*, 12 M. & W. 324).

A right to the uninterrupted flow of such streams cannot be acquired by prescription (*Chasemore v. Richards*, 7 H. L. C. 349), though it may be acquired by express grant (*Whitehead v. Parks*, 2 H. & N. 870). Any such right against another person, founded upon length of enjoyment, is supposed to have originated in some grant; but what grant could be presumed in the case of percolating waters depending upon the quantity of rain falling, or the natural moisture of the soil, and in the absence of any visible means of knowing to what extent, if at all, the enjoyment would be affected by any water percolating in and out of the defendant's or any other land? The presumption of a grant only arises where the person against whom it is to be raised might have prevented the exercise of the subject of the presumed grant, but how could a man prevent or stop the percolation of water? (per Whiteman, J., in *Chasemore v. Richards*, *sup.*). The owner of land containing

underground water, which percolates by undefined channels and flows to the land of a neighbour has the right to divert or appropriate the percolating water within his own land so as to deprive his neighbour of it (*Corporation of Bradford v. Pickles*, (1895) A. C. 587).

Although a land owner has unrestricted liberty to collect or dispose off underground water as he pleases, regardless of his neighbour's interest, yet—

(1) he is not entitled to pollute water flowing beneath another's land (see *Bellard v. Tomlinson*, 29 Ch. D. 115); and

(2) he will be restrained from drawing off underground water from his neighbour's land, if, in doing so, he necessarily abstracts water which has once flowed in a defined surface channel (*Grand J. C. Co. v. Shugar*, L. R. 6 Ch. 485).

A and B two neighbours, each possessed a well, A turned sewage into his well, in consequence whereof the well of B became polluted, it was held that an action lay by B against A. For there is a considerable difference between intercepting water in which no property exists, and sending a new foreign and deleterious substance on to another's property. The immediate *damnum*, namely, the pollution of the water, might be possibly no legal *damnum*; but allowing sewage to escape into another's property is of itself an *injuria* which needs no *damnum* (*Bellard v. Tomlinson*, 29 Ch. D. 115).

Where the plaintiff's mill was worked by a river supplied by water produced by the rainfall over a large district, and the defendant sunk a well on his own land, and pumped up water for the supply of Croydon, thereby preventing an enormous quantity of water from ever reaching the river or the mill, it was held that the plaintiff had no right of action against the defendant (*Chasemore v. Richards*, 7 H. L. C. 370). Where a local Board of Health, represented by the defendant, made a drain to collect percolating underground water, and the effect was that surface water which flowed in a defined stream sunk into the earth, and the stream was diminished; it was decided that, though ordinarily a land owner has the right to act as the defendant had acted, yet that he had no right even indirectly to interfere with the surface stream, and an injunction was granted to restrain him from collecting the underground water in such a manner as to interfere with that on the surface (*The Grand J. C. Co. v. Shugar*, L. R. 6 Ch. 483). This case is distinguished, from *Chasemore v. Richards* where the water in

the river was diminished, but was diminished by preventing the subterranean water from ever reaching it, not as in this case by drawing water away from the river itself.

A lessor demised by lease a distillery, cottages, and thirteen and a half acres of land, with two ponds, "together with the right to the water in the said ponds and in the streams leading thereto." The lessor sunk a tank on ground outside but adjoining the demised subjects, and drew off from marshy ground percolating water which would have found its way eventually into one of the ponds. Held, that water percolating through the ground towards the pond was not water in any stream leading to the pond (*McNab v. Robertson*, (1897) A. C. 129).

### 3. RIGHT TO FREE ACCESS OF LIGHT AND AIR.

Every man has a natural right to use and enjoy the light and air which naturally come to him in any way he thinks proper, provided he does not cause unjustifiable damage to other persons by his mode of using them, but this natural right, differing from the natural right to the flow of water, is subordinate to the right incident to property, which every person has to build on his own land. Every landowner has a perfect right to build on his own ground, though he thereby obstructs his neighbour's light and air, unless his neighbour has acquired a right against him that his light and air shall not be obstructed (*Tapling v. Jones*, 11 H. L. C. 290; *Frewen v. Phillips*, 11 C. B. N. S. 449—*Goddard*, 266). The passage of light and air over lands unincumbered by buildings must necessarily have existed from time immemorial: but the use of the light and air so passing, by means of windows in house or otherwise, confers no right unless it has been continued during twenty years (*Gale*, 286).

The strict right of property entitles the owner to so much light and air only as fall perpendicularly on his land. The right to receive light and air in a lateral direction, without obstruction, can be acquired only as an easement

by (1) grant or covenant express or implied, or (2) prescription.

### *Air.*

According to English law it is doubtful whether a right to the free access of air can be gained except by express grant (*Chastey v. Ackland*, (1897) A. C. 155). But a right to the free access of air through a particular aperture may be acquired by implied lost grant, or by immemorial user (*Bass v. Gregory*, 25 Q. B. D. 481; *Hall v. Lichfield Brewery Co.*, 49 L. J. Ch. 655; *Dent v. Auction Mart Co.*, L. R. 2 Eq. 238).

An owner or occupier of land or buildings has no natural right to free passage of air over open adjoining land. Such a right cannot be acquired as an easement or by a lost grant (*Bryant v. Lefever*, 4 C. P. D. 172). A right to have air come over a neighbour's land in a particular channel to a particular place may be established by immemorial user; but in the absence of actual contract, no one can claim a right to have the general current of air over his neighbour's property kept uninterrupted (*Chastey v. Ackland*, (1897) A. C. 155).

Every owner of land has a natural and Common law right that the air which passes over his land shall not be polluted by other persons, and any person who pollutes it, without an acquired right, is guilty of a wrongful act (*Bliss v. Hall*, 4 Bing. N. C. 183), but an adverse right to pollute the air which passes from the land of one person to that of another may be acquired, and when acquired is an easement (*Flight v. Thomas*, 10 A. & E. 590—*Goddard*, 47).

*Indian law.*—Access and use of air to and for any building may be acquired under the Indian Easements Act, V of 1882, if it has been peaceably enjoyed therewith, without interruption, for twenty years (s.15). The right to air is

co-extensive with the right to light (*Delhi and London Bank v. Hem Lall Dutt*, 14 Cal. 839; *Pranjivandas v. Mayaram*, 1 B. H. C. 148).

The extent of a prescriptive right to the passage of light and air to a certain window, door or other opening is that quantity of light or air which has been accustomed to enter that opening during the whole of the prescriptive period irrespectively of the purposes for which it has been used (Indian Easements Act, s. 28 (c)).

Where an action was brought to prevent the owner of adjoining land from building so as to interrupt the passage of air to the plaintiff's mill, it was held that no such action lay (*Webb v. Bird*, 13 C. B. N. S. 841); and it was so held where an action was brought to restrain the defendant from building so as to obstruct the access of air to the plaintiff's chimneys (*Bryant v. Lefever* 4 C. P. D. 172).

*Indian law.*—There is no right as a right to the uninterrupted flow of south breeze as such (*Delhi and London Bank v. Hem Lall Dutt*, *sup.*). The owner of a house cannot by prescription claim to be entitled to the free and uninterrupted passage of a current of wind. He can claim no more air than what is sufficient for sanitary purposes (*Barrow v. Archer*, 2 Hyde 125).

**Infringement.**—The right to the purity of air is not violated unless the annoyance is such as materially to interfere with the ordinary comfort of human existence (per Lord Romilly, M. R., in *Crumph v. Lambert*, L. R. 3 Eq. 413).

*Indian law.*—Where the easement disturbed is a right to the free passage of air to the openings in a house, damage is substantial if it interferes materially with the physical comfort of the plaintiff, though it is not injurious to his health (Explanation III to s. 33 of the Indian Easements Act).

The Indian Easements Act is not extended to the Bengal Presidency and principles laid down in the Limitation Act generally govern cases of interference with the access of air to dwelling-houses. The Calcutta High Court has held that obstruction in such cases must be such as to cause what is technically called a nuisance to the house; in

other words, to render the house unfit for the ordinary purposes of habitation or business (*Delhi and London Bank v. Hem Lall Dutt*, 14 Cal. 839).

*Light.*

Light and air resemble each other in many particulars. The principles regarding the right to free access of light closely resemble those relating to the free passage of air. Under the English law the rights to light and air are acquired differently. Right to light is acquired under the Prescription Act which necessitates an enjoyment without interruption for a full period of twenty years, to confer the right. Whereas the right to air can be acquired at Common law. The Indian Easements Act places light and air on the same footing (*Delhi and London Bank v. Hem Lall Dutt*, 14 Cal. 839). To establish right to light it requires an uninterrupted user for at least twenty years with the acquiescence of the owner of the servient tenement (*Elliot v. Bhoobun Mohun*, 12 B. L. R. 406; *Sarubai v. Bapu*, 2 Bom. 660). But where the person obstructing the light is a mere trespasser the owner can have action against the obstructor even though the owner has not obtained by prescription an easement of light (*Dhuman v. Muhammad*, 19 All. 153).

Thus, the right to light is not a natural right (*ex jure naturae*) incident to the ownership of windows, but an *easement* to which title must be shown—

(1) By grant or covenant, express or implied.

(2) By prescription under the Prescription Act (2 & 3 Will. IV. c. 71, s. 3) in England, and the Indian Easements Act (V of 1882, s. 15) in India.

(3) By reservation (express or implied) on the sale of the servient tenement.

The right thus acquired is an absolute and indefeasible right to the enjoyment of the light, without reference to the



purposes for which it has been used. It can only be claimed in respect of a building ; the use of an open piece of ground for a purpose requiring light will not create an easement against an adjacent owner (*Potts v. Smith*, L. R. 6 Eq. 311).

An existing right to light is not lost by enlarging, rebuilding, or altering, the windows for which access of light is claimed so long as the ancient lights, or a material part thereof, remain substantially capable of continuous enjoyment (*Tapling v. Jones*, 11 H. L. C. 290). Where a new building has been erected on the site of one in respect of which a right to the access of light had been joined, then, in order to entitle the owner of the new building to access of light, it must be shown that some defined part of an ancient window admitted access of light through the space occupied by a defined part of an existing window (*Pendarves v. Munro*, (1892) 1 Ch. 611). If a person opens new lights, these may be obstructed with impunity ; but an existing right is not lost by interruption which is not continuous in time and quantity, but temporary and of fluctuating amount (*Presland v. Bingham*, 41 Ch. D. 268).

**Infringement.**—In the case of light, it is not every possible, every speculative, exclusion of light which is the ground of an action ; but that which the law recognises is such a diminution of light as really makes the premises to a sensible degree less fit for the purposes of business (per Tindal, C. J., in *Parker v. Smith*, 5 C. & P. 438). The merely taking off a ray or two will not be sufficient (per Lord Denman, in *Pringle v. Wernham*, 7 C. & P. 377 ; *Thorpe v. Brumfitt*, L. R. 8 Ch. 650). There must be a substantial privation of light, sufficient to render the occupation of the house uncomfortable, and to prevent a person from carrying on his accustomed business as beneficially as he had done prior to obstruction (*Back v. Stacey*, 2 C. &

P. 465; *Dent v. Auction Mart Co.*, L. R. 2 Eq. 245; *Calcraft v. Thompson*, 15 W. R. 387; *Kelk v. Pearson*, L. R. 6 Ch. 809; *City of London Brewery Co. v. Tennant*, L. R. 9 Ch. 212; *Ecclesiastical Commrs. v. Kino*, L. R. 14 Ch. 213). In considering what would be a substantial diminution and substantial damage, it is held that the proper point of view is to pay regard, not to what some person having fantastic or peculiar views might choose to regard as a substantial diminution or as substantial damage, but to the views of persons of ordinary sense and judgment. And, in particular, in considering whether a house has been substantially injured, it is proper to have regard to the ordinary uses by way of habitation or business to which the house has been put, or might reasonably be supposed to be capable of being put (per Romer, L. J., in *Warren v. Brown*, (1902) 1 K. B. 22).

The defence that no material injury will be done to the plaintiff, and there would be ample light remaining for the business carried on by him will not hold good. It is not necessary that the obstruction of light should be injurious to him in the trade in which he is *now* engaged. The right to light is an absolute indefeasible right without reference to the purpose for which it has been used. And no person will be allowed to interrupt it, unless he can show that, for whatever purpose the plaintiff might wish to employ the light, there would be no material interference with it by the alleged obstruction (*Yates v. Jack*, 1 Ch. 295; *National Provin. Plate Glass Ins. Co. v. Prudential Ass. Co.*, 6 Ch. D. 757; *Moore v. Hall*, 3 Q. B. D. 178).

There is no difference as to the easement of light between sky lights and other windows (*Harris v. Kinloch & Co.*, (1895) W. N. 60).

**Special purpose.**—A person who is in the present enjoyment of an access of light to his premises for a special or

extraordinary purpose, such as photography, may obtain an injunction against interference with it though he may not have been in the enjoyment of it for that special purpose for the whole of the statutory period (*Lazarus v. Artistic Photo. Co.*, (1897) 2 Ch. 214; *Lanfranchi v. Mackenzie*, L. R. 4 Eq. 421; *Corbett v. Jones*, (1892) 3 Ch. 137; *Warren v. Brown*, (1902) 1 K. B. 15; *Nur Muhammad v. Alim-ullah*, 3 A. W. N. 256). Under an implied grant of light sufficient light for ordinary business purposes alone is granted and not light for special purposes, *e. g.*, wool-sorting (*Corbett v. Jones*, (1892) 3 Ch. 137).

*Indian law.*—No damage is substantial unless it materially diminishes the value of the dominant heritage, or interferes materially with the physical comfort of the plaintiff, or prevents him from carrying on his accustomed business in the dominant heritage as beneficially as he had done previous to instituting the suit (Explanations I and II to s. 33 of the Easements Act. See *Kadarbhai v. Rahimbhai*, 13 Bom. 674; *Dhunjibhoy v. Lisboa*, 13 Bom. 252; *Ghanasham v. Moroba*, 18 Bom. 474; *Sultan Nawaz Jung v. Rustomji*, 20 Bom. 704; 2 Bom. L. R. 518, 24 Bom. 156, P. C.). An easement of light to a window only gives a right to have buildings that obstruct it removed so as to allow the access of sufficient light to the window (*Bala v. Maharu*, 20 Bom. 788).

As the Indian Easements Act is not extended to the Bengal Presidency the following principles laid down in *Bagram's* case will apply there :

“The only amount of light for a dwelling house which can be claimed by prescription or by length of enjoyment without an actual grant is such an amount as is reasonably necessary for the convenient and comfortable habitation of the house (p. 46). Principles of general convenience, upon which the presumptions of right to light by prescription or

grant depend, require that light in a dwelling house, which has been uninterruptedly used for a long time, should not be darkened so as to render the house unfit for comfortable habitation, but they do not require such a presumption as would impede the erection of buildings on the servient tenement, which would not deprive the dominant house of any degree of what was reasonably necessary for comfortable habitation" (per Peacock, C. J., in *John Bagram v. Khettranath*, 3 B. L. R. 18; followed in *Delhi and London Bank v. Hem Lall Dutt*, 14 Cal. 839; *Modhoosoodun v. Bissonauth*, 15 B. L. R. 361).

The Court will look not merely to the use to which rooms, in a dwelling house from which light is obstructed, are *actually put* at the time of the obstruction, but also to the use to which they *may be put* for all reasonable purposes of occupation. It is immaterial whether the light is admitted through a window or a door (*Ratanji v. Edalji*, 8 B. H. C. 181).

**The 45 degree rule.**—It was supposed for some years that a building does not constitute a material obstruction in the eye of the law, or at least was presumed not be such, if its elevation subtended an angle not exceeding 45 degrees at the base of the light alleged to be obstructed, or, as it was some times put, left 45 degrees of light to the plaintiff (*i. e.*, in other words, when opposite to ancient lights a wall is built not higher than the distance between that wall and the ancient lights). But now it has been conclusively ruled that no such rule exists (*Thud v. Debenham*, 2 Ch. D. 165; *City of London Brewery Co. v. Tennant*, 9 Ch. 212; *Ecclesiastical Commrs. v. Kino*, 14 Ch. D. 213; *Parker v. First Avenue Hotel Co.*, 24 Ch. D. 282). Recently it has been decided that there is no rule of law that ancient lights may be interfered with by a building provided that it leaves them an angle of 45 degrees of light;

but in judging of the probable effect of a proposed building upon ancient lights the Court may not unreasonably regard the fact that an angle of 45 degrees will be left as *prima facie* evidence that there will be no substantial interference, and may require this presumption to be clearly rebutted by satisfactory evidence (*Home and Colonial Stores Ltd. v. Colls*, (1902) 1 Ch. 302). But in this case Vaughan Williams, L. J., has said: "I wish to add for myself that, so far as the rule of 45 degrees is concerned, I doubt very much whether that rule, as the law is now settled, can be regarded even as a rough measure of the right of the owner or occupier of ancient lights" (*ib.*, 314).

*Indian law.*—The Calcutta High Court has said that the "45-degree rule" is not a positive rule of law, but is a circumstance which the Court may take into consideration, and is especially valuable when the proof of the obscuration is not definite or satisfactory (*Delhi & London Bank v. Hem Lall Dutt*, 14 Cal. 839; *Bala v. Maharu*, 20 Bom., 790).

The defendants proposed to erect a building in the City of London on the opposite side of the street to that on which the plaintiff's premises were situate. The new building would deprive the plaintiffs of a substantial amount of light, causing them real damage, though light enough would be left for the ordinary purposes of the occupancy of the premises as a place of business, and though the selling and letting value of the premises would not be affected thereby. Held, that the plaintiffs were entitled to an injunction (*Home and Colonial Stores v. Colls*, (1902) 1 Ch. 302). Where the owner of a building with ancient windows overlooking the defendant's premises pulled down the building, and erected another with a blank wall without any windows, and fifteen years afterwards the defendant erected a building next this blank wall, and the plaintiff then opened windows in the blank wall in the place where his ancient windows formerly stood, and brought an action against the defendant for the obstruction to the light and air caused by the defendant's new building, it was held that the windows thus opened could not claim the privileges of the ancient windows which had formerly existed on the same spot, that these privileges had been lost by manifest disuse, and that the action was not maintainable (*Moor v. Rawson*, 3 B. & C. 332). The owner of a building having windows with move-

able shutters, which are opened at his pleasure for the admission of light, acquires a prescriptive right to light (*Cooper v. Straker*, 40 Ch. D. 21). The fitting of windows with stained glass does not deprive the owner of the right to the free access of light (*Att.-Gen. v. Queen Anne's Mansion Co.*, 60 L. T. 759).

*Indian cases.*—Where a person, who has a right to light from a certain window, opens a new window, or enlarges the old one, the owner of an adjoining house has a right to obstruct the new or enlarged opening, if he can do so without obstructing the old, but if he cannot obstruct the new without obstructing the old, he must submit to the burden (*Provabuttu v. Mohendro Lall*, 7 Cal. 453; *Lallu v. Padamsi*, (1889) P. J. 310). Where the plaintiff had for over twenty years carried on the business of manufacturing a particular kind of cloth in a certain house, and the defendant built in the neighbourhood of that house in such a manner as to render the plaintiff's house practically useless for the purposes of his manufacture, it was held that the plaintiff was entitled to an injunction and not merely to damages (*Yaro v. Sana-ullah*, 19 All. 259).

**Remedy.**—In cases of infringement of light and air an injunction may be granted to prevent the obstruction. In order to obtain an injunction a plaintiff must establish substantial injury suffered or threatened. There is no standard or fixed amount of light to which alone a plaintiff is entitled. He must not be fanciful or fastidious: he must recognise the necessity of give and take in matters of this nature. But there may be real damage to the owner or occupier of a building used for particular purposes or reasonably adapted for particular purposes, although there would be no real damage if the building were not used or reasonably adapted for such purposes. The application of these principles is far more easy when the building which is complained of has been erected and damages only are claimed; but they have to be applied when the plaintiff comes for an injunction before the building has been erected. It is the duty of the Court to arrive at the best conclusion it can upon the effect which the proposed building, if erected, would produce; and if the Court is satisfied that in that event the plaintiff would have a good cause of action,

the plaintiff is entitled, as a matter of right, to an injunction to prevent the defendant from interfering with his ancient light; or, in other words, to restrain the defendant from committing a wrongful act (per Cozens-Hardy, L. J., in *Home and Colonial Stores Ltd. v. Colls*, (1902) 1 Ch. 311).

*Indian law.*—In cases of light, Courts ought not to interfere by way of injunction when obstruction of light is very slight and where the injury sustained is trifling, except in rare and exceptional cases (*Dent v. Auction Mart Co.*, L. R. 2 Eq. 238; *Herz v. Union Bank of England*, 2 Giff. 686). But where the defendant is doing an act which will render the plaintiff's property absolutely useless to him unless it is stopped, in such a case, inasmuch as the only compensation, which could be given to the plaintiff, would be to compel the defendant to purchase his property out and out, the Court will not, in the exercise of its discretion, compel the plaintiff to sell his property to the defendant by refusing to grant him an injunction and awarding him damages, on that basis (*Holland v. Worley*, 26 Ch. D. 578). Between these two extremes, where the injury to the plaintiff would be less serious, where the Court considers the property may still remain with the plaintiff and be substantially useful to him as it was before, and where the injury is one of a nature that can be compensated by money, the Courts are vested with a discretion to withhold or grant injunction, having regard to all the circumstances of the particular case before them (per Farran, J., in *Ghanasham v. Moroba*, 18 Bom. 474, at p. 489). In some cases mandatory injunction also will be granted. Courts will grant such injunctions where a man, who has a right to light and air which is obstructed by his neighbour's building, brings his suit and applies for an injunction as soon as he can after the commencement of the building, or after it has become apparent that the intended building will interfere

with his light and air (*Dent v. Auction Mart Co.*, L. R. 2 Eq. 238; *Aynsley v. Glover*, L. R. 18 Eq. 544; *Smith v. Smith*, L. R. 20 Eq. 500; *Krehl v. Burrell*, L. R. 7 Ch. D. 551; *Greenwood v. Hornsey*, L. R. 33 Ch. D. 471; *Syud Mahomed v. Syud Jafur*, 4 W. R. 23; *Jamnadas v. Atmaram*, 2 Bom. 133; *Nandkishor v. Bhagubhai*, 8 Bom. 95; *Kadarbhai v. Rahimbhai*, 13 Bom. 674; *Bala v. Maharu*, 20 Bom. 788). Before granting a mandatory injunction the Court should be satisfied that a substantial loss of comfort has been caused and not a mere fanciful or visionary loss (*Dhonnumal v. Bhagwan Das*, 3 Panj. L. R. 599; *Abdulla v. Beg Mahomed*, 5 Bom. L. R. 446). But when a plaintiff has not brought his suit or applied for an injunction at the earliest opportunity, but has waited till the building has been finished, and then asks the Court to have it removed, a mandatory injunction will not generally be granted (*Isenberg v. The East I. H. E. Co.*, 3 De G. J. & S. 263; *Curriers Co. v. Corbett*, 2 Dr. & Sim. 355; *Durell v. Pritchard*, L. R. 1 Ch. App. 244; *City of London Brewery Co. v. Tennant*, L. R. 9 Ch. App. 212; *Stanley of Alderley v. Shrewsbury*, L. R. 9 Eq. 616; *Benode Coomaree v. Soudaminey*, 16 Cal. 252; *Beharee v. Mt. Ajnas*, 6 W. R. 86; *Dhanjibhoy v. Lisboa*, 13 Bom. 252; *Ghanasham v. Moroba*, 18 Bom. 474; *Sultan Nawaz v. Rustomji*, 20 Bom. 704; on appeal, 2 Bom. L. R. 518, 24 Bom. 156, P. C.).

#### 4. RIGHT OF WAY.

Rights of way do not fall under the denomination of Natural Rights. Rights of way are never given by law to owners of land (a special characteristic of a natural right), but they are discontinuous easements, and may be acquired in the same ways as other easements are required. As to the precise nature of a right of way, there is no difference in principle between a *public right* of way and a *private*



*right of way*, as it is in either case the mere right of passing over the soil of another person uninterruptedly, though in the one case the right is for every individual to pass, while in the other it is for a particular person only. The right is not a right to the land, not to any corporeal interest in the land, and the soil is in no way the property of the owner of the right. From this it follows that, so long as the owner of the right of way is not prevented from enjoying his easement, he has no right to prevent the land owner doing anything he pleases with the soil ; neither has he any right to complain of or interfere with any other person, whatever he may be doing, eventhough it may be an unlawful act or a trespass as against the owner of the soil. The right of way may be created by express grant, or by immemorial custom or necessity (*Imambundee v. Sheo Dyal*, 14 W. R. 199 ; *Bhugvan v. Khosal*, 7 W. R. 271 ; *Nubeen v. Bhooban*, 15 W. R. 526 ; *Oomur Shah v. Ramzan*, 10 W. R. 363 ; *Municipality of Poona v. Vaman*, 19 Bom. 797 ; *Charu Surnokar v. Dokowri*, 8 Cal. 956) ; or by prescription (*Ram Gunga v. Gobind*, 16 W. R. 284 ; *Savalgiapa v. Basvanapa*, 10 Bom. H. C. 399 ; *Joy Doorga v. Juggernath*, 15 W. R. 295 ; *Heera Lal v. Purmessur*, 15 W. R. 401 ; *Mohin Chunder v. Chundee*, 10 W. R. 452 ; *Gopee v. Bhoobun*, 23 W. R. 401 ; *Sham Bagdee v. Fukeer*, 6 W. R. 222).

As to the nature of rights of way, they may be general in their character, or, in other words, usable for all purposes and at all times (*Raj Manick v. Ruttan*, 15 W. R. 46 ; *Lokenath v. Monmohun*, 20 W. R. 293), or the right to use them may be limited to particular purposes, *e. g.*, for sweepers (*Jadulal v. Gopal Chandra*, 13 Cal. 136 ; *Esubai v. Damodar*, 16 Bom. 552 ; *Saloji v. Pandoji*, (1875) P. J. 172), or to certain times (*Ram Soonder v. Woomakant*, 1 W. R. 217 ; *Oomur Shah v. Rumzan*, 10 W. R. 363). Thus, a right of way may be limited to agricultural purposes only

—and the existence of such a right is not itself sufficient evidence of a general right for all purposes—as to carry lime or stone from a newly opened quarry (*Jackson v. Stacty*, Holt. N. P. 455), or it may be limited to the purpose of driving cattle (*Joy Doorga v. Juggurnath*, 15 W. R. 295; *Mahomed v. Safatoollah*, 22 W. R. 340), or carriages (*Ranchordas v. Maneklal*, 17 Bom. 648), or of the passage of boats (*Koylash Chunder v. Sonatun*, 7 Cal. 132; *Doorga Churn v. Kally Coomar*, 7 Cal. 145), or it may be a horse way or merely a way for foot passengers (*Bellard v. Dyson*, 1 Taunt. 279; *Goluck Chunder v. Tarinee Churn*, 4 W. R. 49; *Hamid Hossein v. Gervain*, 15 W. R. 496; *Tarinee Churn v. Tarinee Churn*, 1 Ind. Jur. N. S. 6; *Ranchordas v. Maneklal*, 17 Bom. 648; *Wutzier v. Sharp*, 15 All. 217; *Municipality of the City of Poona v. Vaman*, 19 Bom. 797; *Naran v. Lallubhai*, 2 Bom. L. R. 116); or the right of user may be limited to such times as a gate is open (*Raghupati v. Bapuji*, (1874) P. J. 3), or to certain hours of the day, or when the crops are off the land. But the extent of the right must always depend upon the words of the instrument creating the right, if any written instrument exist, or it must be measured by the accustomed user, if the right has been gained by prescription.

A right of way by sufferance over another's land cannot create a permanent right (*Ashootosh v. Teeloo*, (1864) W. R. 293). A right of way is ordinarily a right of passing, and not a general right to pass from one point to another point (*Goluck Chunder v. Tarinee Churn*, 4 W. R. 49).

By the Common law of England there are three distinct classes of rights of way and other similar rights.

(1) There are private rights in the strict sense of the term vested in particular individuals or owners of particular tenements, and such rights commonly have their origin in grant or prescription.

(2) There are rights belonging to certain classes of persons, certain portions of the public, such as the freemen of a city, the tenants of a manor, or the inhabitants of a parish or village. Such rights commonly have their origin in custom.

(3) There are public rights in the full sense of the term which exist for the benefit of all King's subjects and the source of these is ordinarily dedication.

These three classes of rights exist in England as well as in India (per Wilson, J., in *Chuni Lall v. Ram Kishen*, 15 Cal. 460).

A person commits a wrong who disturbs the enjoyment of a right of way by blocking it up permanently or temporarily, or by otherwise preventing the free use of it.

**Action.**—With regard to *first* and *second* classes of rights of way they do not require a permanent obstruction to give rise to a right of action. Thus, the padlocking of a gate is sufficient (*Kidgell v. Moore*, 9 C. B. 365). Permitting carts or waggons to remain stationary on the road in the course of loading and unloading, so as to obstruct the passage over the road, will give rise to an action (*Thorpe v. Brumfitt*, 8 Ch. App. 650). In the case of an obstruction to a private right of way proof of special damage is not material (*Baij Nath v. Tetai Chowdhry*, 6 C. W. N. 197).

As regards the *third* class it may be noted that no action will lie for obstruction to a public way without showing any particular or special inconvenience or injury beyond that suffered by any member of the public (*Satku v. Ibrahim*, 2 Bom. 457; *Gehanji v. Ganpati*, 2 Bom. 469; *Kazi Sujandin v. Madhavdas*, 18 Bom. 693; *Baroda Prasad v. Gora Chand*, 3 B. L. R. 295, 12 W. R. 160; *Raj Lukhee v. Chunder Kant*, 14 W. R. 173; *Bhageeruth v. Gokul*, 18 W. R. 58; *Bhageeruth v. Chundee Churn*, 22 W. R. 463; *Parbati Charan v. Kali Nath*, 6 B. L. R. 73; *Ramtarak v. Dinanath*, 7

B. L. R. 184, 24 W. R. 414; *Raj Koomar v. Sahebzada*, 3 Cal 20; *Abzul Miah v. Nasir*, 22 Cal. 551; *Mahomed v. Latif Hosein*, 24 Cal. 524; *Raj Narain v. Ekadasi Bag*, 27 Cal. 793; *Mahomed v. Dilbar*, 5 C. W. N. 285; *Adamson v. Arumugam* 9 Mad. 463; *Siddeswara v. Krishna*, 14 Mad. 177; *Karim v. Budha*, 1 All. 249; *Fazal Haq v. Maha Chand*, 1 All. 557; *Nathu v. Jagram*, 1 A. W. N. 3; *Tafaz-zul Husain v. Fazal*, 1 A. W. N. 103; *Ramphal Rai v. Raghunandan*, 8 A. W. N. 205; *Kandhi v. Kamta*, 1 A. W. N. 98; *Tota v. Sardul*, 8 A. W. N. 213). Such special damage must differ not merely in *degree* but in *kind* from that sustained by the rest of the public (*Nurali v. Ram Gopal*, P. R. 10 of 1878; *Maluk Singh v. Bela Sing*, P. R. 134 of 1882; *Beliram v. Kaku*, P. R. 39 of 1888; *Chajju Mal v. Ganda Mal*, P. R. 4 of 1895; *Jowand Singh v. Sadar Indar Singh*, P. R. 64 of 1901; *Tota v. Sardul*, 8 A. W. N. 213; *Purandas v. Girdhardas*, (1897) P. J. 165).

## 5. RIGHT OF PRIVACY.

A right to undisturbed privacy is not recognized by the English law. On this point Kindersley, V. C., said: "With regard to the question of privacy, no doubt the owner of a house would prefer that a neighbour should not have the right of looking into his windows or yard, but neither this Court, nor a Court of law, will interfere on the mere ground of invasion of privacy; and a party has a right even to open new windows, although he is thereby enabled to overlook his neighbour's premises, and so interfering perhaps with his comfort" (*Turner v. Spooner*, 30 L. J. Ch. 80). And Blackburn, J., has remarked: "It is quite true that the opening of a new window looking into the grounds of another may not only annoy that neighbour, but may often affect the value of the property. But the

law of England considers that no injury " (*Jones v. Tapling*, 12 C. B. N. S. 842).

*Indian law.*—Under the Indian Easements Act (s. 18, ill. (b) ) a right to privacy may be acquired in virtue of a local custom. Such an easement founded as it is on the oriental custom of secluding females is of much importance in India. It is recognised generally by the countries whose system is founded on the Civil law, and the Law Commissioners who framed the Easements Act have also recognised it.

The Bombay High Court has held that in accordance with the usage of Gujarat, an invasion of privacy is an actionable wrong, and that a man may not open new doors or windows in his house, or make any new apertures, or enlarge old ones, in a way which will enable him to overlook those portions of his neighbour's premises which are ordinarily secluded from observation, and so intrude upon his privacy (*Manishankar v. Trikam*, 5 B. H. C. A. C. J. 42). This right of action is not altered by the fact that a public road runs between the dominant and the servient tenements (*Kuwarji v. Bai Javer*, 6 B. H. C. A. C. J. 143). But, where a window opened by the defendant commanded a view, not of the plaintiff's private apartments, but of an open courtyard outside his house, it was held that there had been no invasion of the plaintiff's privacy which would entitle him to have the window closed (*Keshav v. Ganpat*, 8 B. H. C. A. C. J. 87). And in a case from Dharwar the High Court has ruled that to establish such an exceptional privilege, as is customary in this respect in the towns of Gujarat, evidence of the most satisfactory character is necessary. In this case the plaintiff opened a new window in his house, which rendered the defendant's house less private than before; it was held that the plaintiff was not guilty of any tortious act, and should not be debarred from improving

his own house, though the effect might be, to some extent, prejudicial to his neighbour (*Shrinivas v. Reid*, 9 B. H. C. 266). The right of privacy does not arise from prescription but is a creation of custom which has been recognised as such in Gujrat by judicial decisions. It is limited to particular apartments secluded from general observation (*Nathubhai v. Chhaganlal*, 2 Bom. L. R. 454).

The Calcutta High Court has laid down that to hold that privacy is a *right*, and the invasion of it an *injury*, would lead to the most alarming consequences to the owners of house property in towns. This right cannot exist at any rate independently of prescription or grant or express local usage (per Markby, J., in *Mahomed v. Birju*, 5 B. L. R. 680, 681; *Kali Prasad v. Ram Prasad*, 18 W. R. 14. See also *Ramlal v. Mohesh*, 5 B. L. R. 677n). Privacy is not an inherent right of property to ancient lights and air (*Sheikh Golam v. Sheikh Ahmud*, 6 B. L. R. AP. 76).

The Madras High Court has decided that the invasion of privacy by opening windows is not treated by the law as a wrong for which any remedy is given (*Komathi v. Gurunada*, 3 M. H. C. 141; *Sayyad Azuf v. Ameerubibi*, 18 Mad. 163). The person whose privacy is so invaded has it in his power to build on his own ground so as to shut out the view from the offending window (*Sayyad Azuf v. Ameerubibi*, *sup.*).

The Allahabad High Court has held that a customary right of privacy, under certain conditions, exists in India and in the North-Western Provinces, and is not unreasonable, but merely an application of the maxim *sic utere tuo ut alienum non laedas* and *aedificare in tuo proprio solo non licet quod alteri noccat*. A substantial interference with such a right, where it exists, if without the consent or acquiescence of the owner of the dominant tenement, affords such owner a good cause of action. Every case must

depend on its own facts. The primary question must in all cases be:—Does the privacy in fact and substantially exist, and has it been and is it in fact enjoyed? If it were found that no privacy substantially exists or is enjoyed, there would be no further question in an ordinary case to decide. If, on the other hand, it were found that privacy did substantially exist and was enjoyed, the next question would be:—Was that privacy substantially or materially interfered with by acts of the defendant alone without the consent or acquiescence of the person seeking relief against those acts? (per Edge, C. J., in *Gokal Prasad v. Radho*, 10 All. 358; *Lachman Prasad v. Jamna Prasad*, 10 All. 162). It has further decided that the right of privacy is a right which attaches to property and is not dependent on the religion of the owner thereof (*Abdul Rahman v. D. Emile*, 16 All. 69).

The Chief Court of Punjab has decided that a right of privacy exists in the Province of Punjab, and if opening of new windows invades such right an action may be brought (*Nanuck Chund v. Lalla*, P. R. 21 of 1869; *Gohree v. Jaintee*, P. R. 91 of 1869; *Shibdyall v. Golab*, P. R. 96 of 1876; *Yasin v. Gokul Chund*, P. R. 19 of 1881).

**Damages for injuries to easements.**—In actions for injuries to easements, such as rights of way, watercourses, light and so forth, no rule can be laid down as to the measure of damages. They will vary in each case, according to the species and amount of injury caused. Frequently, however, such actions are brought where no actual injury has been suffered, to try a right; and the question is, whether the plaintiff is entitled to nominal damages. In such cases, the rule may be laid down, that where an actual infringement of right has taken place an action will lie and the plaintiff will be entitled to a verdict with nominal damages, though no real loss has been sustained.

Some legal damage, however, will only be presumed where there has been a clear violation of a right.

*Profits a prendre.*

A *profit a prendre* may be defined as a right for any man, in respect of his tenement, to take some profit out of the tenement of another man (*Williams*). Under the English law an easement is a privilege *without profit*, and confers no right to participate in the profit of the soil charged with it. The right to receive air, light, or water passing across a neighbour's land may be claimed as an easement, because the property in them remains common. But a right by which one person is entitled to remove and appropriate for his own use any part of the soil belonging to another man, or anything growing in or attached to or subsisting upon his land for the purpose of the profit to be gained from the property thereby acquired in the thing removed is a different species of right from an easement and is commonly called a *profit a prendre*. The right of depasturing cattle on another's land, the right to cut therefrom and carry away turf or wood for burning within the dwelling house; the right to dig for and carry away stone, slate, coal, and minerals; the right to shoot and sport over another's land, and carry away and consume the game killed; or the right to fish in the water of an estate or of a manor, and carry away and consume the fish taken are all denominated as *profits a prendre* in English law, but they fall into the category of easements according to Indian Law (*Sundarabai v. Jayawant*, 23 Bom. 397). A *profit a prendre* in another's soil cannot be claimed by custom, however ancient, uniform and clear the exercise of that custom may have been; and an unlimited *profit a prendre* on another's soil cannot be claimed by prescription (*Vasudev v. Coll. of*



*Thana*, (1879) P. J. 278; *Vaman v. Coll. of Thana*, 6 B. H. C. 191; *Lloyd v. Jones*, 17 L. J. C. P. 206; *Bailey v. Stevens*, 31 L. J. C. P. 226). The usually accepted classes of *profits a prendre* are—

1. Rights of Common

(a) Common of Pasture; which may be

- (1) Appendant (3) *Pur cause de vicinage*  
(2) Appurtenant (4) In gross.

(b) Common of Piscary (right of fishery).

(c) Common of Estovers.

(d) Common of Turbary.

2. Rights of Ferry.

3. Rights to Market.

I. RIGHTS OF COMMON.

Right of Common is a right which one person, who is not the owner, has of taking some part of the natural produce of land belonging to another (*Elton*). There are four kinds of rights of Common, *viz.*, (1) Common of Pasture; (2) Common of Piscary; (3) Common of Estovers; and (4) Common of Turbary (*Woolrych*). The three essential ingredients with regard to this right are: (1) any number of persons may have separate rights of common over the same land, or a body of persons may have a joint right for their own benefit, or in trust for others who may be legally incapable of taking it in their own names; (2) the right of common must be exercised on the land of another; and (3) the right extends only to taking part of any particular product of the land (*Elton*). As a general rule rights of common are acquired in the same manner as easements, *viz.*, either (1) by grant; or (2) by prescription, which implies a grant. Similarly, the remedies for disturbance of a right

of common are the same as for the denial or obstruction of an easement.

(a). **Common of Pasture** may be either (1) Appendant ; (2) Appurtenant ; (3) *Pur cause de vicinage* ; or (4) In Gross. Right of common is *appendant* where the common is limited to beasts that serve the plough or manure the land. It is *appurtenant* where there is a right of depasturing a limited number of beasts upon the common. It is in *gross* where it arises from a grant to a particular person and his heirs, or by prescription. Pasture, in its widest sense, comprises all vegetable products that may be eaten, such as grass, nuts, acorns, the mast of trees, the right to which is known by the name of *pannage*, and even leaves and boughs (*Williams*). It, also, imports a right to take by the mouths of the commoner's animals, as horses, oxen, swine, and geese, not only grass and other wild herbage upon a waste, but also, leaves, masts, &c., on which any of them can be fed (*Elton*). The common being free and open, to all having commonable rights over it, it follows that when the owner of the land, or some other person, so encloses or obstructs it that the commoner is precluded from enjoying the benefit to which he is by law entitled, the commoner may maintain an action (*City Commrs. of Sewers v. Glass*, L. R. 19 Ex. 134). Thus, if the owner ploughs it up, or drives off the commoner's beasts, or stocks it with rabbits to such an extent that all the herbage is eaten by them, he commits a tort.

(b). **Common of Piscary.**—The right of fishery which a person might possess in any piece of water is not a right to the fishes living in such water at any time,—for fishes, like other *feræ naturæ* cannot, except in certain instances, be in the possession or dominion of any man until they are actually captured,—but that it is simply a right to catch them. This right may exist either in connection with, or indepen-

dently of, the ownership of the soil, over which water stands or flows. Rights of fishery are considered according as they are to be exercised—

- |                                    |                         |
|------------------------------------|-------------------------|
| (1) In the High sea.               | (4) In rivers which are |
| (2) In the territorial waters.     | tidal and navigable.    |
| (3) Over the foreshore of the sea. | (5) In lakes and ponds. |

**Infringement.**—A person commits a wrong when he fishes in another's fishery, whether he takes fish or not; or when he disturbs, or drives away, or destroys the fish in a fishery; or diverts the water to an unreasonable extent.

Where defendant wrongfully discharged into a stream, the exclusive right of fishing in which was given to the plaintiff, water loaded with sediment, the effect of which was to drive away the fish and injure the breeding, it was held that the defendant was liable (*Fitzgerald v. Firbank*, (1897) 2 Ch. 96).

**Remedy.**—The disturbance of rights of fishery may be redressed or prevented either (1) by civil actions; or (2) by criminal proceedings.

(1). *Civil actions.*—Ejectment, trespass, trover, and action upon the case, appear to be the principal civil remedies at law; and a bill of peace, or sometimes an injunction, to be the only remedies in equity for the invasion of rights of fishery (*Woolrych*).

*Indian law.*—Rights of fishery are considered as *profits a prendre* in the English law, but are regarded as easements under the Indian Easements Act. These rights may be granted by the Crown to private individuals; they may also be acquired by prescription (*Haridas v. Mahomed*, 11 Cal. 434; *Viresa v. Tatayya*, 8 Mad. 467). An action for recovery of possession of a fishery, for a declaration of right thereto, for an injunction, or for damages, for catching and carrying away fish seem to be the principal remedies for the vindication or protection of rights of fishery. The Bombay High Court has ruled that a summary action under s. 9 of the Specific Relief Act (I of 1877) for restitu-

tion of possession of an exclusive fishery, whether such fishery be territorial or a right in *alieno solo*, may also be entertained, provided the conditions specified in that section be satisfied (*Bhundel v. Pandol Pos*, 12 Bom. 221). But the Calcutta High Court has held that this form of action does not apply to rights of fishery of the latter kind (*Notobur v. Kubir*, 18 Cal. 80; *Fadu v. Gour Mohun*, 19 Cal. 544, F. B.). This diversity is due to the difference of opinion between the two High Courts, as to the denotation of the term 'immovable property' used in that section, which makes this form of action applicable to such property alone.

(c). **Common of Estovers.**—The word 'estovers' is used to denote certain rights enjoyed by persons who have merely a limited estate or interest in land, being rights necessary to the enjoyment of that estate or interest.

It is a rule of law that estovers must be reasonable; also that they must be strictly applied to their respective purposes, and to none other. Any excess in the enjoyment or any misapplication of the just amount would be waste (*Scivinous v. Norton*, 9 Bing. 640).

(b). **Common of Turbary** is the right to take peat or turf which has become by course of time fit for burning, and not green turf, for the purpose of using the same for fuel in a messuage (*Williams*). Common of turbary is generally taken at present to include both rights of digging and rights of paring in the same waste, and to apply to pared turf as well as to peat (*Grant v. Gummer*, 1 Taunt. 435; *Dawson v. M' Groggan*, (1903) 1 I. R. 92). The peat or turf taken must not only be fit for fuel, but must be actually used for that purpose (*Elton*).

## 2. RIGHTS OF FERRY.

A ferry is the exclusive right of carrying passengers in boat across a river or arm of the sea. It can only arise

by royal franchise, which may, however, be presumed from immemorial user (*Underhill*). The right is an incorporeal right, unaccompanied, in general, by any property in the soil (*Peter v. Kendall*, 6 B. & C. 710).

In India a right of ferry or an interest therein is immovable property within the meaning of Specific Relief Act, I of 1877, s. 9 (*Krishna v. Akilanda*, 13 Mad. 54). The right of establishing a private ferry and levying tolls is recognized here. Twenty years in the shortest period within which such a right of ferry can be established (*Purmeshari v. Mahomed*, 6 Cal. 608). But in a later case it is held that such rights can only be acquired by a grant from the Crown (*Nityahari v. Dunne*, 18 Cal. 652). The mere fact of being the owner of both banks of a river does not give the right of ferry (*Safir Merdha v. Nobo Kishore*, 2 W. R. 286). The disturbance of a right of ferry is in the nature of a nuisance (*Yard v. Ford*, 2 Saund. 172), and the cause of action in the case of the violation of this right is a continuing wrong within s. 23 of the Limitation Act, 1877 (*Nityahari v. Dunne*, 18 Cal. 652).

**Infringement.**—A person commits a tort who disturbs a ferry, either by refusing to pay a reasonable toll, or by setting up a new ferry or passage to the diminution of the custom of the legal ferry. A ferry is the connecting link between two highways or two towns, and the carrying of passengers in boats belonging to other people to and from places so near these highways or towns as to allow the passengers to rejoin these highways almost immediately, will be a disturbance of the ferry, and the persons so conveying over will be committing a tort (*Blissett v. Hart*, Willes 508). The ferrying over of persons to places near these highways or towns will not be construed as an interference with the ferry, provided it is shown that it is not done fraudulently, or as a pretence for avoiding the

regular ferry (*Tripp v. Frank*, 4 D. & E. 666). The plea that the legal ferry is not sufficient for the public convenience owing to the altered condition of the neighbourhood will not avail (*Newton v. Cubitt*, 5 C. B. N. S. 627-*Underhill*).

To create a disturbance of the rights of an ancient ferry owner, there must be a *carrying* of passengers and merchandise from *point to point* in the *line* of the ancient ferry; and when that is done, directly or indirectly, and where it is clear that the ancient ferry owner has the undoubted right to the transport of passengers using that way, or of merchandise conveyed that way, then the owner has a cause of action against the wrong doer (per Lindsell and Campbell, JJ., in *Makhan Sing v. Secretary of State*, P. R. 30 of 1877 : see *Kishore Lall v. Gokool Monee*, 16 W. R. 281 ; *Narain Singh v. Nurendro*, 22 W. R. 269).

Where a railway bridge with a footpath had been erected about half a mile above the legal ferry, it was held that although the erection of a bridge in the line of the ferry so as to take the traffic of the highways between which the ferry plies would be an infringement, yet when a bridge is made to provide for a new traffic, and in no way takes the traffic directly from the two termini of the ferry, the owner of the ferry cannot claim compensation from the railway company for interference with the ferry (*Hopkins v. G. N. Ry.*, 2 Q. B. D. 224).

*Indian case.*—A, the owner of a ferry granted him under a Government Settlement, brought a suit to restrain B from running another ferry over the same spot where A's ferry plied for hire. It appeared, on the evidence, that B levied no tolls on his ferry, but it was not shown that it was used only for the conveyance of his own servants and ryots. Held, that such suit was maintainable (*Luchmessur v. Leelanund*, 4 Cal. 599). The plaintiffs purchased the ferry lease of the Chenab and Phulku rivers at Wazirabad, giving them the exclusive right to levy tolls on those rivers. The defendant conveyed materials and workmen from the north and the south side, to the middle of the bed of the Chenab, by means other than the ferry bridge, thereby causing an alleged loss to plaintiff : held, that the action of the defendant amounted to a tort, and not to a breach of contract (*Makhan Sing v. Secretary of State*, P. R. 30 of 1877).

### 3. RIGHTS TO A MARKET.

Originally it was considered a great benefit to towns to give them a fair or market ; and this was thought so

beneficial that it was thought right, not only to give the fair or market, but also to grant a charter so as to prevent persons from disturbing the market. The right to prevent persons from selling marketable goods on market days in their private houses (though within the town or manor where the market may be held) may be acquired by immemorial enjoyment or prescription (*Mosley v. Walker*, 7 B. & C. 40). A market without mites or bounds may extend over adjoining streets, which will be presumed to have been dedicated to the public, subject to the exercise of the market rights (*Att.-Gen. v. Horner*, 11 App. Cas. 66, *Addison*).

**Infringement.**—If people come to a market to sell their wares, they are subject to toll, which is payable to the owner of the market (*Great Yarmouth v. Groom*, 1 H. & C. 102); and if they come near the boundary of the market, and avail themselves of the concourse of persons coming to and fro, to find customers, and sell without the boundary of the market, so as to avoid the payment of the toll, an action is maintainable against them by the owner of the market for a disturbance of the market (*Bridgland v. Shapter*, 5 M. & W. 375). But it must be proved that the thing was done wilfully and intentionally (*Brecon v. Edwards*, 1 H. & C. 51). It is not necessary that the defendant should actually have sold anything; any active interference by him in the conduct of the new market, or participation in its profit or risk is sufficient (*Mayor of Dorchester v. Enson*, L. R. 4 Ex. 335).

The grantee of a market, who takes a toll for his own benefit incurs an obligation to maintain the market in a state reasonably fit for the purpose for which it was granted. If, therefore, he erects any obstruction in the market of such a nature as to be dangerous to cattle, he is responsi-

ble for any injury thereby caused to the cattle of those who attend the market (*Lax v. Corporation of Darlington*, 5 Ex. D. 29—*Addison*).

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## CHAPTER XVII.

### TORTS TO PERSONALTY OR MOVABLE PROPERTY.

TORTS purely affecting movable property are :—

1. Trespass to goods.
3. Conversion.
2. Trespass *ab initio*.
4. Detention.

#### 1. *Trespass to goods.*

An action for trespass to goods lies wherever there has been an actual taking of, or a direct and immediate injury to, another person's goods (*Bullen*). Every direct forcible injury, or act, disturbing the possession of goods without the owner's consent, however slight or temporary the act may be, is a trespass, whether committed by the defendant himself or by some animal belonging to him (*Fouldes v. Willoughby*, 5 M. & W. 540). An action of trespass will also lie for taking or injuring domiciled and tame animals, such as dogs, horses, &c. (*Wright v. Ramscot*, 1 Saund. 83 ; *Dand v. Sexton*, 3 T. R. 37).

**Animals.**—Beating the plaintiff's dogs is a trespass (*Dand v. Sexton*, 3 T. R. 37). Where the defendant with a little dog chased the plaintiff's sheep out of his grounds, where they were trespassing, and the sheep went into another man's land next adjoining, and the dog pursued them there, and the defendant did his best to recall his dog, but the dog could not be recalled at once, and the plaintiff sued the defendant for chasing and worrying his sheep ; it was held that the action was not maintainable as the defendant had not incited the dog to chase the sheep after they had left his premises, but had done his best to call the dog off (*Mitten v. Faudrye*, 4 Burr. 2094). But the chasing of trespassing beasts with a mastiff dog is unlawful ; and, if any damage is done to them by such a dog, the owner will be responsible for a trespass (*King v. Rose*, 1 Freem. 347). Where the defendant's horse injured the plaintiff's mare, by biting and kicking her on the plaintiff's land, it was held to be a trespass (*Ellis v. Loftus Iron Co.*, L. R. 10 C. P. 10). Wild animals are not the subject of property while unconfined, but if A starts a hare on the land of B,

and kills it there, it is trespass, for so long as the hare remains on B's land it is his property (*Sutton v. Moody*, 1 Ld. Raym. 250).

**Goods.**—If one lawfully having goods of another for a particular purpose destroys them he is guilty of trespass (*Cooper v. Willomat*, 1 C. B. 692).

**Action.**—The plaintiff must have an actual or a constructive possession of the goods (*Smith v. Milles*, 1 T. R. 480; *Johnson v. Diprose*, (1893) 1 Q. B. 512), or a legal right to the immediate possession of them (*ib.*). The fact that a person is in actual possession of goods is *prima facie* evidence of his right to such possession, consequently, though he may not in truth be entitled to the possession of the goods, he is in a position to maintain an action for trespass against another person who has seized or injured them, if such other cannot show a better title in himself or some one else under whose authority he acted (*Elliott v. Kemp*, 7 M. & W. 312).

It is no defence to an action of trespass to set up a *jus tertii* to rebut the title of a plaintiff who was in actual possession of the goods at the time of the trespass, unless it can be shown that the defendant acted under the authority of the person really entitled to the possession of the goods (*Jeffries v. S. W. Ry.*, 5 E. & B. 802). If, however, the plaintiff was not in actual possession of the goods at the time of the trespass, the proving of a *jus tertii* would afford a good defence to the action, even though the defendant acted without the authority of the person entitled to the possession (*Gadsden v. Barrow*, 9 Ex. 514; *Richards v. Jenkins*, 17 Q. B. D. 544). The fact that the trespass was unintentional is no ground of defence (*Leame v. Bray*, 3 East 593, 599; *Stanley v. Powell*, (1891) 1 Q. B. 86).

Where the trespass was direct, there lay *action of trespass* for damages for the direct injury done to the property. Where the injury done resulted *indirectly* from the trespass, there lay the so called action of *trespass on the case*, for damages.

A joint owner can maintain an action of trespass against his co-owner if the latter has done some act inconsistent with the joint ownership (*Jacobs v. Seward*, 5 H. L. 464).

#### JUSTIFICATIONS.

The justifications or defences to an action of trespass are :—

1. **Self-defence or defence of property.** If a person has actual possession of goods and another wrongfully attempts to take the same from him against his will, he is justified in using such force as is necessary under the circumstances for the purpose of defending his own possession and preventing the act of trespass. It is perfectly justifiable to kill a naturally ferocious animal which is found at large, *e. g.*, a lion, or a tiger; but this does not extend to justify a person killing a ferocious dog found at large (*Indermaur*). A dog chasing sheep or deer in a park or rabbits in a warren, may be shot by the owner of the property in order to save them (*Wells v. Head*, 4 C. & P. 568). A man cannot shoot a dog if it is chasing animals *feræ naturæ* (*Vere v. Lord Cowder*, 11 East 569; *Read v. Edwards*, 34 L. J. C. P. 31).

2. **Exercise of one's absolute or relative rights.**— Thus seizing goods of another, under a lawful distress for rent or damage feasant, is lawful.

3. **Obedience to some legal or personal authority, *e. g.*, due process of law.**

4. **Negligent or wrongful act of the plaintiff himself.** If a person place his horse or cart so as to obstruct the right of way, it may be removed even by applying force for that purpose (*Slater v. Swan*, 2 Str. 892).

If a person takes away another's carriage and paints it anew without his authority, the person to whom the carriage belongs is entitled to have the carriage without paying for the painting (*Hiscox v. Greenwood*, 4 Ex. D. 174).

5. **Recaption** is the retaking by a lawful owner of goods of which he has been wrongfully deprived.

**Damages.**—In an action for trespass to goods, the damages in general are measured by the value of the goods, or the amount of injury done to them. Special damage resulting from the immediate loss or injury may also be allowed for, if not of too remote a nature. In mitigation of damages, the defendant may of course show any thing which tends to diminish the value of the thing affected, or the amount of loss incurred, or may negative the malicious motive ascribed to him.

In an action for injury to the plaintiff's horse by a collision, it was held that he might recover the keep of the horse at the ferrier's while it was being cured, the ferrier's bill, and the difference between the value of the horse before and after the accident; but he could not recover the hire of another horse which the plaintiff had been obliged to have while his own was laid up (*Hughes v. Quentin*, 8 C. & P. 703). The defendant's carriage was driven against the wheel of the plaintiff's chaise; the collision threw a person who was in the chaise upon the dashing board; the dashing board fell on the back of the horse; the horse kicked in consequence, and by kicking injured the chaise. It was held that the plaintiff might recover for the whole of the loss so sustained (*Gilbertson v. Richardson*, 5 C. B. 502).

*Indian case.*—Where the defendants without leave quarried on the land of the plaintiff and removed a large quantity of stone therefrom, it was held that the plaintiff was entitled to recover by way of damages the value of the stone after it was quarried, and that the defendants were not entitled to a deduction therefrom of the cost they had incurred in quarrying the stone (*Dajiba v. B. B. & C. I. Ry.*, 6 B. H. C. A. C. J., 235; following *Martin v. Porter*, 5 M. & W. 351).

## 2. *Trespass ab initio.*

A person who lawfully takes a chattel, but afterwards abuses or wastes it, renders himself a trespasser *ab initio* (*Oxley v. Watts*, 1 T. R. 12).

## 3. *Conversion.*

To constitute a conversion there must be a wrongful taking, or using, or destroying of the goods; or an exercise

of dominion over them inconsistent with the title of the owner (*Bullen*).

An act of conversion may be committed—

1. When the property is wrongfully taken.
2. When it is wrongfully parted with.
3. When it is wrongfully sold in market overt although not delivered.
4. When it is wrongfully retained.
5. When it is wrongfully destroyed.

#### I. CONVERSION BY TAKING.

Anyone who without authority takes possession of another man's goods with the intention of asserting some right or dominion over them is *prima facie* guilty of conversion. But a person who seeks to acquire some property in a chattel not being aware of the title of the true owner is not guilty of a conversion by the mere fact of taking possession. A mere taking unaccompanied by an intention to exercise permanent or temporary dominion may be a trespass, but is no conversion (*Fouldes v. Willoughby*, 8 M. & W. 540). The taking need not be with the intention of acquiring a full ownership. It is enough if any interest is claimed inconsistent with the right of the person truly entitled (*Tear v. Freebody*, 4 C. B. N. S. 228). Any asportation of a chattel for the use of the defendant or a third party amounts to a conversion (per Alderson, B., in *Fouldes v. Willoughby*, *sup.*). The taking may be constructive merely, as by a transfer on the books of a warehouseman or an indorsement of a document of title (*M'Combie v. Davies*, 6 East 538). But a man does not convert goods simply by making a contract for their purchase; the conversion takes place on the acceptance of delivery of the goods or of the document which represents them (*Hollins v. Fowler*, 7 H. L. 757—C. & L., 197). Actually dealing with another's

goods as owner for however short a time, and however limited a purpose, is conversion. It makes no difference that such acts were done under a mistaken but honest supposition of being lawfully entitled (*Kleinwort v. Comptoir d'Escompte*, (1894) 2 Q. B. 157; *Union Credit Bank v. Mersey Docks &c.*, (1899) 2 Q. B. 205), or with the intention of benefiting the true owner (*Hiort v. Bott*, L. R. 9 Ex. 86). If a person acts as agent for another who subsequently, although without a knowledge that the sale was illegal, adopts it, the latter will also be liable (*Hilbery v. Hatton*, 2 H. & C. 832).

The plaintiff had embarked in the defendant's ferry-boat, two horses, and had paid for their passage. Subsequently, the latter without justification refused to carry out his contract and desired the plaintiff to remove the horses from the boat, which the plaintiff refused to do. The defendant then took them from the plaintiff and turned them loose on the landing place. It was held that the simple removal of the horses by the defendant for a purpose wholly unconnected with any the least denial of the right of the plaintiff to the possession and enjoyment of them, was no conversion (*Fouldes v. Willoughby*, 8 M. & W. 540). If a man takes the property of another without his consent by abuse of the process of the law, he is guilty of conversion (*Grainger v. Hill*, 4 Bing. N. C. 221). Taking the property of another by assignment from one who had no authority to dispose of it, and refusing to deliver it up to the principal after notice and demand by him, none other than the person in whose name it is warehoused being able to take it out, is a conversion (*M'Combie v. Davies*, 6 East 538).

*Indian case.*—Where a pledgee, having power to sell for default, takes over, as if upon a sale to himself, the property pledged, without the authority of the pledgor, but crediting its value in account with him, he is liable for conversion (*Neckram v. Bank of Bengal*, 19 Cal. 322. See *Moyi v. Aruthraman*, 22 Mad. 197).

*Leading cases.*—*M'Combie v. Davies*; *Hilbery v. Hatton*.

## 2. CONVERSION BY PARTING WITH GOODS.

A plaintiff who sues for conversion and relies on the fact that the defendant unlawfully parted with the possession of his goods gives the go-bye to the question whether that possession was originally acquired wrongfully or

innocently ; for the moment he is content to treat it as lawful. The defendant, on this assumption, cannot be guilty of any wrong by merely giving a temporary custody to some servant or agent, since by so doing he does not alter his position (*Canot v. Hughes*, 2 Bing. N. C. 448). The wrongful act is done when he purports to give to some stranger, along with the mere possession, some right over the property itself, whether as owner or *dominus pro tempore*. The taking and the giving are, in fact, whether actual or constructive, the different sides of one unlawful transaction, and the transferor and the transferee may be considered as joint wrong-doers (*C. & L.*, 199).

It is a conversion if a man hands over goods to another so as to give him a lien or special property (*Syed v. Hay*, 4 T. R. 264). Misdelivery by a carrier or warehouseman will amount to a conversion (*Devereux v. Barclay*, 2 B. & Ald. 762 ; *Stephenson v. Hart*, 4 Bing. 476).

The hirer of a piano, who sends it to an auctioneer to be sold, is guilty of a conversion ; and so is the auctioneer who refuses to deliver it up, unless the expense incurred be first paid (*Leschman v. Machin*, 2 Stark, 211). The plaintiffs in consequence of a telegram from their agent, consigned certain barley to the defendant, and sent him a delivery order on production of which he was entitled to receive the barley from the carriers. The defendant had, in fact, ordered no barley. The agent called on him the next day and said that it was a mistake. The defendant thereupon by way of setting matters right, and believing that he was in effect returning the barley to the plaintiffs, endorsed over the delivery order to the agent, who thereby obtained the barley and absconded with the proceeds. It was held that the defendant was liable for a conversion, since he had in effect parted with the plaintiff's property to a person who had no right to receive it (*Hiort v. Bott*, L. R. 9 Ex. 86). Wrongful sale of goods is a conversion (*Edward v. Hooper*, 11 M. & W. 363). If a man who is entrusted with the goods of another puts them into the hands of a third person, contrary to orders, it is a conversion ; so if the pawnee of goods with the power of sale, sells them before the day stipulated for the exercise of the power of sale, has arrived (*Johnson v. Stear*, 15 C. B. N. S. 330). If a vendor, who has sold goods on credit, resells the goods before the day of payment has arrived, he is guilty of conversion, and so, he is, though the purchaser makes default in payment, unless he has given the pur-

chaser due notice of his intention to sell (*Page v. Cowasji*, L. R. 1 P. C. 127). If the holder of a bill for a specific purpose gets money on it by discount without authority, this is a conversion of the whole, though he may have received only part of the money due on it; and the whole amount may be given as damages (*Alsagar v. Close*, 10 M. & W. 576). But if A is entrusted with a bill to get it discounted, and afterwards misapplies the proceeds he is not liable for conversion (*Palmer v. Jarmain*, 2 M. & W. 182). A, the owner of a personal chattel, sold a half share to B on a special agreement that A should retain possession until the chattel was sold. A handed it to B to take it to an auction room, and B pledged it to defendants to secure a debt. Held, that A had special property in it sufficient to maintain an action (*Nyberg v. Handelaar*, (1892) 2 Q. B. 202). N pledged with the plaintiffs as security for an advance eighteen hogsheads of tobacco which were in the custody of the defendants as warehousemen. He subsequently repaid the advance on one of the hogsheads, and presented to the plaintiffs for their signature a delivery order on the defendants. On the order the place for the quantity was left blank. The plaintiffs signed the order, and N, having filled in the blank space with the words "eighteen hogsheads," obtained delivery of them all from the defendants, and then disposed of them. In an action against the defendants for the conversion of the seventeen hogsheads, it was held that the plaintiffs could not succeed, since they had impliedly given N authority to fill up the blank in the delivery order, and were estopped from shewing that that authority was limited. In the second action it appeared that N had pledged with the plaintiff two separate consignments of tobacco. He paid off the advance on one consignment, and presented to the plaintiffs a properly drawn delivery order in respect of it. They signed it, and N subsequently added above their signature the description and distinguishing marks of the other consignment, and thus obtained from the defendants delivery of both consignments. Held, that an action for conversion would lie against the defendants, since the plaintiffs had not been guilty of any negligence which was the proximate cause of the wrongful delivery. In the third action it appeared that N, after fraudulently obtaining the tobacco as above stated, had pledged it with the defendant bank as security for an advance, and before the fraud was discovered had repaid the advance and recovered possession of the tobacco. Held, that no action for conversion would lie against the defendant bank, since N's dealing with it had been concluded before the plaintiffs discovered the fraud (*Union Credit Bank v. Mersey Docks and Harbour Board*, (1899) 2 Q. B. 205). If a person aids and assists in the sale of goods under a fraudulent and void warrant of attorney, he may render himself liable for conversion (*Brillier v. Young*, 6 E. & B. 1).

*Indian case.*—K received into his godown certain goods belonging to the plaintiff and in charge of his servant concerning which there was a dispute between the plaintiff's agent and B, of which circumstances K was aware;



and he advanced money to B on the security of such goods, which were subsequently delivered to B and sold by him with the knowledge of K; and, notwithstanding the plaintiff's servant objected to it, delivered them to the purchaser. Held, that K was liable for damages at the instance of the plaintiff in an action for conversion of the goods (*Anunt Dass v. Henry Kelly*, 1 N. W. P. 107).

### 3. CONVERSION BY SALE IN MARKET OVERT.

Unless it be in market overt, there can be no conversion by a mere bargain and sale without a transfer of possession; such an act is void and does not change the property or the possession (*Lancashire Wagon Co. v. Fitzhugh*, 6 H. & N. 502; *Consolidated Co. v. Curtis & Son*, (1892) 1 Q. B. 498); but in market overt the property is passed to the purchaser by the sale, which is therefore equivalent to physical destruction, and the vendor is liable in trover to the true owner (*Farrar v. Beswick*, 1 M. & W. 688; *Delaney v. Wallis*, 14 L. R. Ir. 31) though the goods be never delivered to the purchaser in pursuance of such sale (*C. & L.*, 202).

A employed auctioneers to sell her furniture by auction at her house; she had previously granted a bill of sale to B, of which the auctioneers had no notice. The auctioneers sold the furniture and delivered it to the purchaser. Held, that they were liable for conversion (*Consolidated Co. v. Curtis & Son*, *sup.*).

### 4. CONVERSION BY KEEPING.

The ordinary way of showing a conversion by unlawful retaining of property is to prove that the defendant having it in his possession refused to give it up on demand made by the party entitled. It is necessary that at the time of the demand made the defendant should be so far in a position to return the property, that he has it in his custody or under his control. The demand as well as the refusal should be unconditional in their terms (*Rushworth v. Taylor*, L. R. 3 Q. B. 699).

**Demand and refusal.**—Whenever the goods of one man have lawfully come into the hands of another, the owner, or person entitled to the possession of them, should go himself, or send some one with a proper authority, to demand and receive them; and, if the holder of the goods then refuses to deliver them up, or to permit them to be removed, there will be evidence of a conversion (*Thoroughgood v. Robinson*, 6 Q. B. D. 772). A demand and refusal do not in themselves constitute the conversion. They are evidence of a conversion at some previous period (*Wilton v. Girdlestone*, 5 B. & Ald. 847). A refusal must be proved, it need not be express (*Watkins v. Woolley*, Gow. 69). It is no conversion, if the goods are not in the possession, and under the control of the defendant, at the time of the refusal (*Smith v. Young*, 1 Camp. 441). A refusal by a servant to deliver up goods he has received from his master, without order or authority from the latter, is a qualified, reasonable and justifiable refusal (*Alexander v. Southey*, 5 B. & Ald. 247). But a refusal by a general agent is not evidence of a conversion by the principal, without proof of the authority for the particular refusal (*Pothonier v. Dawson*, Holt N. P. 383). If when goods are demanded, the person in possession of them refuses to deliver them except upon a condition which he has no right to impose (*Davis v. Vernon*, 6 Q. B. D. 540), such as giving a receipt in writing for the goods (*Barnett v. Crystal Palace Co.*, 2 F. & F. 443), that is tantamount to an absolute refusal, and he is guilty of a conversion. If the person in possession of the goods says, when the goods are demanded of him, that he shall do nothing but what the law requires, and does not produce or tender the goods, this is evidence of a conversion of them (*Davis v. Nicholas*, 7 C. & P. 339). But, though, he at first refuses, if he afterwards, and before a writ is issued against him, goes to the plaintiff and offers to deliver them

up to him, the effect of the previous refusal is done away with, and there is then no evidence of a conversion (*Hayward v. Seaward*, 1 M. & Sc. 549).

A chimney sweeper found a very valuable jewel and he took it to a jeweller's to ascertain its value. The jeweller taking advantage of the boy's simplicity, told him it was worthless and offered him three half-pence for it, which the lad declined and demanded the jewel back. The jeweller refused to do so; whereupon the boy successfully sued him for it. In this case the jewel was considered to be of the highest value (*Armory v. Delamirie*, 1 Str. 505). Certain cattle of the plaintiff, wrongfully taken in execution, had been left in a stable of an inn. The plaintiff demanded them several times of the wife of the inn-keeper, who refused to hand them over on the ground that she had received no indemnity. Held, that this was good evidence of possession and conversion by the wife (*Caterall v. Kenyon*, L. R. 3 Q. B. 310). The defendant had the charge of a warehouse for his employers and kept the key. The plaintiff demanded certain of his goods which were deposited there, and not obtaining them, at once commenced an action. It was held that the defendant had not refused in such a manner as to afford reasonable evidence of a conversion (*Alexander v. Southey*, 5 B. & Ald. 247). The defendant having been entrusted with the plaintiff's gun damaged it. The plaintiff sent him a written notice to return the gun in the same good plight and condition as he had received it. It was held that a failure on the part of the defendant to comply with the demand could not only by itself be sufficient evidence of a conversion (*Rushworth v. Taylor*, L. R. 3 Q. B. 699). Where a warehouseman refused to give up goods without an order, and being thereupon invited to consult with his principal, and warned that it was intended to bring an action against him, neglected to take any further steps, it was held that he was guilty of a conversion (*Wilson v. Anderton*, 1 B. & Ad. 450). The plaintiff having shipped a certain portion of a cargo on board the defendant's vessel, dispute arose, and the master subsequently refused to give the plaintiff bills of lading in his own name and sailed on his voyage, and ultimately refused to deliver the goods to the plaintiff's agent at the port of destination. It was held that there had been a conversion when the ship sailed away (*Falk v. Fletcher*, 18 C. B. N. S. 403). But, where the master had refused to sign bills of lading except in a certain form, and sailed away, but subsequently made a proper tender of the cargo to the plaintiff at the port of destination, it was held that the master was not guilty of a conversion because he had always held the goods for the plaintiff (*Jones v. Hough*, 5 Ex. D. 115).

*Indian case.*—Two notes are stolen from A, which B (not a *bona fide* holder for valuable consideration) tenders to C in payment of certain articles.

C, not knowing B, refuses to deal with him, whereupon B brings D, who is known to C, and the purchase is made by him. Held, that the part which D performed in the transaction amounted to a "conversion of the notes to his own use," and that he was liable to A (*Kissorymohun v. Rajnarain*, 1 Hydr 263. See *Khursedji v. Pestonji*, 12 Bom. 573). A refusal to deliver up an idol, whereby the person demanding it was prevented from performing his turn of worship on a specified date, gives the party aggrieved a right to sue for damages (*Debendronath v. Oditi Churn*, 3 Cal. 390; *Eshan Chunder v. Monmohini*, 4 Cal. 683). In a suit to recover the value of the plundered property it was ruled that, unless the defendant produced the property and showed it not to be of the value stated by the plaintiff, the strongest presumption should be made against him, and the highest value assumed (*Soomder v. Bhoobun*, 11 W. R. 536).

*Leading case.*—**Armory v. Delamirie.**

#### 5. CONVERSION BY DESTRUCTION.

A conversion by destruction takes place not merely when a chattel is burnt or broken to pieces, but when it is so dealt with that its identity is destroyed (*C. & L.*, 207). Every wilful and wrongful destruction of a chattel, or wilful and wrongful damage to it, whereby the owner is deprived of the use of it in its original state is a conversion of it.

If a man draws wine out of a cask and fills up the deficiency with water, he converts the whole cask as to part by taking the wine, as to the residue by turning it into something different and therefore destroying it (*Richardson v. Atkinson*, 1 Str. 576). To spin cotton into yarn, to grind corn into flour, or to apply any process of manufacture to raw material, may undoubtedly be an act of conversion if done without the authority of the person entitled (*Comyn*). But if the chattel continues to exist as such, any injury done to it is a trespass and not conversion. Hence, where the defendant had sawn asunder a log of timber belonging to the plaintiff, it was held that he was not liable for conversion (*Simmons v. Lillystone*, 8 Ex. 431).

**Defendant's ignorance** of the unauthorised character of his act cannot always be relied upon as a defence. In most cases of conversion there are two elements, first of all a dealing with the goods in a manner inconsistent with the right of the person entitled to them; secondly, an intention

in so doing to deny his right or to assert a dominion which is in fact inconsistent with such right. Ignorance of the right will not affect the quality of the act done, but it may have a material bearing on the question of intention. The following principles will generally apply where a defendant is ignorant of a plaintiff's title—

(1). A defendant is always liable if "he has taken the goods as his own, or used them as if they were his own" (per Brett, J., in *Fowler v. Hollins*, L. R. 7 Q. B. 627). Persons deal with property in chattels or exercise dominion over them at their peril.

(2). When a person, though only as agent, takes part in a transaction which purports to effect a transfer of property in a chattel, and it turns out that his principal had no title, his ignorance of this fact does not protect him, for he has clearly intended an act which is inconsistent with the right of the true owner.

(3). If an agent intermeddles merely with the custody of a chattel in ignorance of his principal's lack of title, and also in ignorance that any alteration of property is intended, he is not guilty of conversion (*C. & L.*, 211).

**Dealings under authority of apparent owner.**—A merely ministerial dealing with the goods at the request of an apparent owner, having the actual control of them, is not conversion (*Heald v. Carey*, 11 C. B. 977). A person dealing with the goods as the servant or agent of such apparent owner, and according to his direction, is not liable if (1) the act done does not purport to involve a transfer of the supposed property in the goods; (2) the ostensible owner's direction is one which he could lawfully give if he were the true owner; and (3) the apparent owner's direction is obeyed in the honest belief that he is owner.

If A steals corn, and takes it to a miller to be ground and returned to him, the miller is not liable in conversion; but if A tells his servant B to sell the stolen corn to C, and B does so, B is liable in conversion, even though he

believes that the corn belongs to his master A. This principle has been recently applied so as to render an auctioneer liable for selling goods in the ordinary course of his business, although he had no notice of the apparent owner's want of title (*Consolidated &c. Co. v. Curtis*, (1892) 1 Q. B. 495). The payee of a crossed cheque specially indorsed it to plaintiffs and posted it to them. S, having obtained possession of the cheque in transmission, altered the indorsement, presented it at the defendants' bank, and requested them to collect it. They did so and handed the proceeds to him in France. Held, that the defendants' bank were liable in an action for conversion (*Kleinwort Sons & Co. v. Comptoir N. D'Escompte &c.*, (1894) 2 Q. B. 157).

### Distinctions between Trespass and Conversion.—(1).

Trespass is essentially a wrong to the actual possessor and therefore cannot be committed by a person in possession (*Johnson v. Diprose*, (1893) 1 Q. B. 512). Conversion, on the other hand, is a wrong to the person entitled to immediate possession. The actual possessor is frequently, but not always, the person entitled to immediate possession, so that conversion may, but does not necessarily, include trespass.

(2). To damage or meddle with the chattel of another, but without intending to exercise an adverse possession over it, is a trespass. A conversion, is a breach, made adversely, in the continuity of the owner's dominion over his goods, though the goods may not be hurt (*Chimery v. Viall*, 5 H. & N. 258).

(3). The gist of the action in trespass is the force and direct injury inflicted; in conversion, it is the deprivation of the use.

**Action.**—The plaintiff, at the time of conversion, must either have an *absolute* or a *special* property in the goods, coupled with possession or the right of immediate possession thereof. *Absolute property* is deemed to exist where a person, having the possession of goods, has also the exclusive right to enjoy them, and which can only be defeated by his own act (*Webb v. Fox*, 3 T. R. 391). Thus, an owner who is either in actual possession of goods, or entitled to the im-

mediate possession thereof, can maintain an action ; but one who has let them to another for a certain term cannot (*Gordon v. Harper*, 7 T. R. 9). *Special property* conveys the idea that he who has the possession of goods holds them subject to the claims of other persons (*Webb v. Fox*, *supra*). For instance, a carrier has a special property in the goods intrusted to him for carriage, and he may bring an action for conversion against a stranger who takes them out of his possession. Thus, to maintain an action for conversion, plaintiff must be the person in actual or constructive possession of the goods (*Smith v. Miller*, 1 T. R. 480). Any possession, however temporary, is sufficient against a wrong-doer. A trustee, having the legal property, may sue in respect of goods, although the actual possession may be in his *cestui que trust* (*Wooderman v. Buldock*, 8 Taunt. 676; *Barker v. Furlong*, (1891) 1 Ch. 172). The action may be brought against any person who was a party to the conversion, although the goods were actually converted by another (2 Wm. Saund. 47).

Before the Judicature Acts the *action of trover* lay for the *value* (not for the return) of the goods. *Action of replevin* lay in theory for recovering damages for the unlawful taking of a chattel away from its owner, but in practice it was almost invariably confined to cases of unlawful taking by way of distress.

### *Justifications.*

The justifications or defences to an action for conversion are—

1. **Lien**, either general or particular. If a man has a lien upon goods, he may refuse to deliver them up until his lien is satisfied; but, if, having a lien upon goods, he claims to retain them on grounds quite distinct from a claim of lien, his refusal to deliver them up will be evi-

dence of a conversion and the existence of the lien will be no answer to an action for the conversion of the property (*Cannee v. Spanton*, 7 M. & G. 903). A man does not waive his right of lien merely by omitting to mention it when the goods are demanded (*Scarfe v. Morgan*, 4 M. & W. 281).

2. **Right of stoppage in transit.**—This defence arises out of contract: See Indian Contract Act (IX of 1872), s. 99.

3. **Denial of plaintiff's right of property**, where plaintiff sues relying on his right only (*Butler v. Hobson*, 4 Bing. N. C. 290).

4. **Denial of possession**, or showing that the detainer was in the exercise of a legal right consistent with the fact of a right of property being in the plaintiff, as that what the defendant did was in the exercise of his legal rights as joint owner with the plaintiff (*Jones v. Brown*, 25 L. J. Ex. 345).

5. **Denial of some qualified right in the chattles** (*Richards v. Symons*, 8 Q. B. D. 90).

**Damages.**—The measure of damages is in general the value of the goods at the time of the conversion, where no special damage has been sustained, and the goods have not been tendered and received back after action (*Wood v. Morewood*, 3 Q. B. D. 440; *Crizzle v. Olly*, 8 Burma L. R. 43; *Bansidhar v. Sant Lal*, 10 All. 133). This would be the market value of the goods at the time of conversion (*Henderson v. Williams*, (1895) 1 Q. B. 521). Where the plaintiff has only a special property in the goods, the damages recoverable in respect of conversion of them by the actual owner would be measured by the limited character of the plaintiff's interest in the goods (*Brierly v. Kendall*, 17 Q. B. D. 937); but if the conversion is by a stranger, the plaintiff is entitled to the full value of the goods notwithstanding the limited nature of his interest (*ibid.*). Malice,



and insult may be taken into consideration as also the fact that the taking was under a false pretence of a legal claim. If the goods are injured, the damages in respect to the value are the amount of deterioration. If the goods are not returned, their value is to be taken at their market price, if any, or otherwise their actual value to the owner at the time of conversion. If the defendant got or retains possession forcibly or fraudulently, and does not produce the article, the presumption will be, that it is of the highest value of an article of that kind (*Armoury v. Delamirie, ubi. sup.*) If the goods have been returned, but have fallen in price, the difference in the price at the time of the tort or of the demand by the plaintiff, and at the time of the return, may be given as a special damage (*Williams v. Archer, 5 C. B. 318—Mayne*). Special damages, far exceeding the value of the goods, are recoverable if shown to be the natural and necessary consequence of the wrongful act. In mitigation of damages partial title may be proved, or it may be shown that the goods were returned, or anything equivalent to it, or that the interest of the plaintiff is nominal only.

*Indian cases.*—The defendants had wrongfully converted to their own use a box of indigo belonging to the plaintiff. The plaintiff sued for the recovery of the box and damages. Held, that the measure of damages was the value of the indigo at the time of the wrongful conversion minus its value at the date it was to be returned to the plaintiff plus interest at 6 p. c. for the intervening period (*Azmat Ali v. Maula, 5 A. W. N. 200*). In an action for the wrongful conversion of certain timber, the plaintiff claimed to recover as damages the market value of the timber at the town of Rangoon to which it was being conveyed at the time of the conversion. Held, that the cost of carriage to Rangoon from the place where the wrongful conversion occurred must be deducted (*Bombay Burmah Trading Corporation v. Mirza Mahomed, 4 Cal. 116, P. c.*). In an action for damages for the detention of ornaments pledged with the defendant which the defendant has wrongfully converted to his own use, the measure of damages is the value of ornaments, less the sum for which they have been pledged (*Hasan v. Goma, 5 B. H. C. o. c. J 140*).

#### 4. *Detention.*

Detention is the adverse withholding of the goods of another. The remedy in English law is an *action of detinue*. It lies for the specific recovery of chattles, wrongfully detained from the person entitled to the possession of them, and also for the damages occasioned by the wrongful detainer. The defendant had, or was assumed to have, come lawfully into possession, as by delivery or finding; but as the gist of the action is the wrongful detention of goods it is immaterial whether the goods were obtained by defendant by lawful means, as by a bailment or finding, or by a wrongful act as a trespass or conversion. The injury complained of is not the taking, nor the misuse and appropriation of the goods, but only the detention. The plaintiff must, as in conversion, have a special and general property, and a right to the immediate possession (*Bullen*). As the object is to recover the specific goods they must be ascertained and capable of identification, and the nature of the things must continue without alteration; the action will not lie for a sum of money or a quantity of grain, unless they be specifically distinguished from other property of the same kind, as by being placed in a bag or sack (*Collett*).

Detinue, considered as a tort, does not substantially differ from conversion by detention.

Where a railway company detains cattle under a mistaken claim for carriage, they will be liable for such detention and consequent harm to the cattle, though carried under a condition against liability for loss, detention, or injury in the carriage of them, as such refusal was unconnected with their transport (*Gordon v. G. W. Ry.*, 8 Q. B. D. 44).

**Action.**—The detention necessary to support an action is an adverse or wrongful detention by the party sued, or by his servants or agents. The plaintiff must show he was entitled to delivery of the goods claimed. There

should be evidence of a request on the part of the plaintiff to have the goods delivered to him, and of a refusal to deliver on the part of the defendant. A defendant, having goods in his possession, is not by reason thereof bound to seek out the plaintiff and send them to him. The plaintiff must come for them (*Clements v. Flight*, 16 M. & W. 42). It is no answer to say, when a demand is made for the redelivery of a chattel that the defendant is unable to comply with the demand by reason of his own negligence or breach of duty. It is clearly no answer to say that he has lost the chattel, and is consequently unable to redeliver it to the plaintiff (*Reeve v. Palmer*, 5 C. B. N. S. 90), or that the defendant abandoned possession of the goods before action by delivering them over to some third person.

**Justification.**—A lien on the goods by the defendant is a good answer.

**Damages.**—Substantial damages will be given for the detention of an article which has fallen in value between the time it was taken and the time it was returned. The value of the goods may be assessed at the price they bore in the market at the time of demand by the plaintiff, or at the time of trial, whichever is the highest (*Archer v. Williams*, 2 C. & K. 27). The remarks made in measuring damages in actions for trespass to goods apply equally here. The proper measure of damages for wrongful detention of property is the difference between the value of the property when seized and its value when restored (*Nandeeram v. Inderchand*, Cor. 89; *Punja v. Oodoy*, 18 W. R. 337).

*Indian case.*—Where plaintiff sued to recover damages for the detention of his coffee estate and certain movable property by the defendant, and for the loss sustained, partly by the destruction of crop and partly by neglect of proper cultivation, it was held that the defendant was liable for the value of the profits of the estate, and of any property removed from the estate, in compensation for any injury caused to the estate (*McIvor v. Stainbank*, 5 M. H. C. 70).

## CHAPTER XVIII.

### TORTS TO INCORPOREAL PERSONAL PROPERTY.

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|---------------|----------------|
| 1. Patent.    | 3. Trade Mark. |
| 2. Copyright. | 4. Trade Name. |

#### 1. *Patent.*

A PATENT right is a privilege granted by the Crown to the first inventor of any new manufacture or invention, that he and his licensees shall have the sole right, during the term of fourteen years, of making and vending such manufacture or invention. In India, the Inventions and Designs Act (V of 1888) governs suits relating to patents.

The patentee must be the true and first inventor. If he has acquired the knowledge of the invention in a foreign country and introduces it into British dominion still he will be looked upon as the first inventor (*Lewis v. Marling*, 10 B. & C. 22; *Marsden v. Saville St. Co.*, 3 Ex. D. 203).

An invention is different from a discovery, and a discovery is not subject-matter for a patent unless it is an addition not only to knowledge, but to known inventions, and produces either a new and useful thing or result, or a new and useful mode of producing an old thing or result (per Lindley, J., in *Lane Fox v. Kensington & K. Elec. Light Co.*, (1892) 2 Ch. 428).

Requisites of a good patent are—

1. The subject-matter of a patent can only be some new ‘manufacture.’ The word ‘manufacture’ not only comprehends productions, but it also comprehends the means of producing them. Therefore, in addition to the thing produced, it will comprehend a new machine or a new combination of machinery, it will comprehend a new pro-

cess or an improvement in an old process (per Lord Westbury in *Ralston v. Smith*, 11 H. L. 246).

2. The subject-matter should be novel. If the public once become possessed of an invention by any means whatever, no subsequent patent for it can be granted either to the first inventor or any other person (*Patterson v. Gas Light Co.*, 3 App. Cas. 244).

3. The subject-matter should have a quality of 'utility' to the public, no matter how small it may be. Utility, in patent law, does not mean abstract, or comparative, or competitive, or commercial utility; but, as applied to an invention, it means that the invention is better than the preceding knowledge of the trade as to a particular fabric, better, that is, in some respect though not necessarily in every respect. For instance, an invention is useful by which an article good, though not so good as one previously known, can be produced more cheaply by a different process. And an invention is useful when the public are thereby enabled to do something which they could not do before, or to do in a more advantageous manner something which they could not do before—or in other words, an invention is patentable which offers the public a useful choice (*Websbach Incandescent Gas Light Co. v. New Incandescent Gas Light Co.*, (1900) 1 Ch. 843).

4. The subject-matter should have an amount of ingenuity.

**Specification.**—A sufficient description of the nature of the invention and the mode of carrying it into effect, so as to enable ordinarily skilful persons to practise and use it at the end of the term for which the patent is granted must be filed with the proper authorities. If the specification is ambiguous, insufficient, or misleading, the patent will be void (*Savory v. Price*, R. & M. 1; *Hinks v. Safety Lighting Co.*, 4 Ch. D. 607; *Simpson v. Holliday*, 1 H. L. 315).

**Infringement.**—A patent privilege may be infringed in several ways—

(1). By making or manufacturing articles for use or sale by means of the art which has been invented by the patentee, or by using, exercising, or putting the art in practice, to the prejudice of the patentee in any other way.

(2). By vending or selling articles made in violation of the patent privilege.

(3). By making for use or sale, or vending articles which counterfeit, imitate, or resemble articles made in pursuance of the invention.

(4). By counterfeiting or imitating the invention in any other way (*Hindmarch*).

A person who has in his possession, for the purpose of sale, an article which is an infringement of a patent thereby renders himself liable for infringement, however innocently he may have acquired the article—as, for instance, by an innocent purchase from an infringing manufacturer—and notwithstanding that he may not have actually exposed it for sale (*Bagot Pneumatic Tyre Co. v. Clipper Pneumatic Tyre Co.*, (1901) 1 Ch. 122).

A patent is a privilege granted by the Crown, but as against subjects only, and not against the Crown; and hence the Crown may, by its officers, servants, or agents, use a patent process without compensating the patentee; but this does not extend to a tradesman who contracts to do work for the Crown, and in doing it uses the patent process, he becomes liable to the patentee (*Dickson v. London S. A. Co.*, 1 App. Cas. 632). To manufacture abroad according to a process patented in India, and then import the substance for sale in India, is a violation of the patent (*Von Hyden v. Neustadt*, 14 Ch. D. 230). Also, importing of such an article, though not for sale yet for the purpose of experiment or instruction, is a user for advantage and an infringement (*United Telephone Co. v. Sharples*, 29 Ch. D. 164). Any one who uses what is an infringement of a patent is liable, though he was only an agent or servant of another who is not himself sued. Thus, the captain of a vessel fitted with pumps which were an infringement of the plaintiff's patent, was held liable, although he was not owner of the vessel (*Adair v. Young*, 22 Ch. D. 13). Posting at a foreign post-office a parcel addressed to

a trader in London containing an article patented in England does not constitute an infringement of the patentee's rights on the part of the sender (*Badische Anilin und Soda Fabrik v. Henry Johnson & Co.*, 13 T. L. R. 344).

#### REMEDIES.

1. **Damages.**—The plaintiff in a patent action is, strictly speaking, entitled to recover such an amount of damages as will fairly compensate him for the injury which he has sustained by reason of the wrongful acts of the defendant proved at the trial. The measure to be applied in assessing damages for infringement of a patent is the pecuniary loss actually sustained by the patentee through the infringement, and no more (*Bagot Pneumatic Tyre Co. v. Clipper Pneumatic Tyre Co.*, (1901) 1 Ch. 122). In order to recover substantial damages in a patent action, it will be necessary for the plaintiff to give such evidence as will enable the Court to estimate the extent of the loss and injury which he has sustained; and in the absence of such evidence, the plaintiff is not entitled to more than nominal damages (*Minter v. Mover*, 1 Webs. R. 138). The damages are to some extent matter of calculation by taking an account of the profits, which have arisen from the use of the invention, from the person who has pirated the same. Where a patentee has been in the habit of granting licenses at a certain royalty, the measure of damages will be the amount of royalty which ought to have been paid, but it will not include a manufacturing profit (*Penn v. Jack*, L. R. 5 Eq. 18; *Sheen v. Johnson*, 2 All. 368; *Govind Mal v. Walter*, P. R. 115 of 1889; *Bhagat v. Hari Ram*, P. R. 24 of 1896).

A plaintiff cannot pray for an account of profits and for damages. He must elect between the two remedies.

2. **Injunction.**—When a patentee can show that he has possession of a patent privilege, under colour of a title, not evidenced merely by his patent, but also supported by

long and undisputed enjoyment, and can also show that the defendant against whom he is proceeding has violated the privilege, he shall have immediate relief, and the protection of an interlocutory injunction. The injunction which a plaintiff obtains by decree, is not merely temporary, or until further orders, but extends to the whole duration of the patent privilege; and not only applies to the particular mode of infringement proved against the defendant, but to all other modes in which the patent privilege may be violated (*Hindmarch*).

## 2. *Copyright.*

Copyright is the exclusive right of multiplying copies of a literary or artistic work already published (*Jeffries v. Boosey*, 4 H. L. 954). It is also defined as "the sole and exclusive liberty of printing or otherwise multiplying copies of any book;" and the term book is defined as "every volume, part or division of a volume, pamphlet, sheet of letter press, sheet of music, map, chart, or plan, separately published" (5 & 6 Vic. c. 45, s. 2).

This right is of two kinds, one existing by the Common law until he has published his work to the world at large (*Exchange Telegraph Co. v. Gregory*, (1896) 1 Q. B. 147), and the other by statute after such publication. Previous to publication an author has absolute control over his own production, and this whether it be literary, artistic, or any other work (*Bewes*).

A copyright exists in the following productions:—

- |              |                              |
|--------------|------------------------------|
| 1. Books.    | 4. Dramatic copyright.       |
| 2. Letters.  | 5. Musical copyright.        |
| 3. Lectures. | 6. Unpublished works of art. |

### I. BOOKS.

The copyright in every book published in the *life-time* of its author shall endure for the natural life of such author,



and for the further term of seven years commencing at the time of his death, and shall be the property of such author and his assigns; provided always that if the said term of seven years shall expire before the end of forty-two years from the publication of such book, the copyright shall in that case endure for such period of forty-two years; and that the copyright in every book published after the *death* of its author shall endure for the term of forty-two years from the first publication thereof, and shall be the property of the proprietor of the author's manuscript, from which such work shall be first published, and his assigns (Act XX of 1847, s. 1). The English law (5 & 6 Vic. c. 45, s. 3) is also to the same effect. The English Statute extends to all parts of India (*MacMillan v. Shamsul Ulma*, 19 Bom. 557).

In the case of contributions to encyclopædias and periodicals the right remains in the proprietor for twenty-eight years, and then reverts to the contributor for the rest of the period (Act XX of 1847, s. 10, Stat. 5 & 6 Vic. c. 45, s. 18).

For an intellectual work to be capable of protection as copyright it is necessary that—

1. It must be innocent; that is, it must not be

(a) Seditious or libellous (the libel being against the State) (*Trade Auxiliary Co. v. Middlesborough*, 43 Ch. D. 425).

(b) Immoral; *e. g.*, a work bearing on the love adventures of a courtesan was not protected (*Stockdale v. Onwhyn*, 5 B. & C. 173).

(c) Blasphemous; thus Lord Eldon refused protection to Lawrence's 'Lectures on Physiology,' as 'hostile to revealed religion, and the doctrine of the immortality of the soul' (*Lawrence v. Smith*, Jacob 471).

(d) Fraudulent, or professing to be what it is not with intent to deceive.

2. It must be of a literary value. The object of law is to protect 'a useful book,' though very little 'usefulness' or material value will suffice to obtain protection. As a general rule there is no copyright in advertisements and labels.

Catalogues will be protected as copyright, unless they are 'merely a dry list of names' (*Holton v. Arthur*, 1 H. & M. 603). A proprietor of a trades directory has copyright in the headings (*Lamb v. Evans*, (1893) 1 Ch. 218). An illustrated catalogue of furniture was protected as to the illustrations, though it was held there was no copyright in the letter press, which was a simple announcement of the sale of goods which every one might sell and announce for sale. There cannot be any copyright in the title of a book except in very rare cases; and the remedy for its use by other people will be akin to that for Common law fraud (*Dicks v. Yates*, 18 Ch. D. 76).

3. It must be original. A very small degree of originality is sufficient to constitute a person an author.

There is copyright in independent translation of a non-copyright work (*Wyatt v. Barnard*, 3 Ves. & B. 77), and there is copyright in compilations as well.

**Infringement.**—Literary property can be invaded in three ways, and in three ways, only:—

(1). Where a publisher in this country publishes an unauthorized edition of a work in which copyright exists, or where a man introduces to sell a foreign reprint of such a work, that is open *Piracy*.

(2). Where a man pretending to be the author of a book illegitimately appropriates the fruits of a previous author's literary labour, that is *Literary larceny*.

(3). There is another mode which is wholly irrespective of any copyright legislation, and that is where a man sells a work under the name and title of another man or another man's work. That is not an invasion of copyright; it is a Common law *fraud*, and can be redressed by Common law remedies (per James, L. J., in *Dicks v. Yates*, 18 Ch. D. 76).

Mere imitation is allowable, so is fair use of existing

books, but not servile copying eventhough the copy be made for private use and not for sale (*Bewes*).

In England, registration of a book at Stationers' Hall is a condition precedent to a right to sue for infringement of copyright (5 & 6 Vic. c. 45, s. 24). In India, the proprietor of a copyright cannot sue or proceed for an infringement of his copyright before having it registered under Act XXV of 1867.

If the author wishes to reserve the right of translating his work, he must notify such an intention on the title page of the work (15 & 16 Vic. c. 12).

Where the defendant represented the incidents of a published novel in a dramatic form upon the stage, it was held that this was not an infringement of the copyright in the novel, as the defendant had neither printed nor multiplied copies of the work (*Reade v. Conquest*, 9 C. B. N. S. 755; *Warne v. Seeborn*, 39 Ch. D. 73). But a person who prints a drama constructed out of a novel, infringes the copyright in the novel (*Tinsley v. Lasey*, 1 H. & M. 747).

*Indian cases.*—The plaintiffs were the publishers and proprietors of a book entitled "The Golden Treasury of Songs and Lyrics," and the defendants published the same selection of poems and songs, but altered their arrangement. It was held that such a selection could be the subject of a copyright because "in the case of works not original in the proper sense of the term, but composed of or compiled or prepared from materials which are open to all, the fact that one man has produced such a work does not take away from any one else the right to produce another work of the same kind, and in doing so to use all the materials open to him. But as the law is concisely stated by Hall, V. C., in *Hogg v. Scott*, (L. R. 1 Eq. 458) 'the true principle in all these cases is that the defendant is not at liberty to use or avail himself of the labour, which the plaintiff has been at for the purpose of producing his work, that is, in fact, merely to take away the result of another man's labour or, in other words, his property'" (*MacMillan & Co. v. Suresh Chunder Deb*, 17 Cal. 961). The plaintiff published a new Sanskrit work, introducing passages from old Sanskrit works and adding foot-notes. The defendant afterwards published an edition of the same work, which was substantially a copy of the plaintiff's book. Held, that the defendant had violated the plaintiff's copyright (*Gangavishnu v. Moreshwar*, 13 Bom. 358). A translation into Persian of a book originally published in Urdu does not constitute an infringement of copyright (*Munshi Abdurruhman v. Mirza*

*Mahomed Shirazi*, 14 Bom. 587); because translations are not copies (*Mac Millan v. Shamsul Ulama*, 19 Bom. 557). The plaintiff, proprietor of the Koh-i-Nur Press, was also proprietor and publisher of a periodical called the Urdu Tarjuma Panjab Record. This periodical, which was an exact translation of the English Panjab Record was published with the permission of, and under an arrangement with, the proprietors of the copyright of the English Panjab Record. The defendant published a periodical called the Anwar-ul-Shams or Urdu translation of the Panjab Record, whereupon the plaintiff alleging a breach of his copyright, sued for an injunction, &c. Held, that the plaintiff's copyright had been infringed. The reports of cases of the Chief Court and of the Financial Commissioner of Panjab which have been published in the Panjab Record are the subject of copyright: that this copyright had been secured according to law by the proprietors of the Panjab Record: and that the plaintiff had, for the period which the periodical publications in dispute covered, lawfully secured to himself exclusive permission to reproduce these reports in Urdu, and that the plaintiff had obtained a copyright in his periodical. "There can be no doubt whatever that the report of cases of the Chief Court and of the Financial Commissioner which have been published in the Panjab Record, on the selection of which from a large mass of cases and on the preparation of which for publication time and trouble and legal knowledge and experience have been expended, are properly the subject of copyright" (per Benton, J., in *Diwan Butan Sing v. Munshi Jagat Narain*, P. R. 15 of 1893).

Cases of infringement of copyright arising in the mofussil should be tried by the Court exercising the highest original civil jurisdiction, that is, by the Court of the District Judge (*In re Hameedoollah*, 6 Cal. 499).

**Damages.**—The defendant must account for each copy of his work sold as if it had been the plaintiff's, and pay the amount of profit which would have resulted from the sale of so many copies of the plaintiff's work (*Pike v. Nicholas*, L. R. 5 Ch. 251).

## 2. LETTERS.

The writer of a letter on his own behalf retains copyright in the letter, so as to hinder the receiver from publishing it, except under special circumstances. The receiver of a letter may publish the letter without the consent of the

writer to use it as evidence in a Court of justice, or to prove his innocence of an injurious and unfounded imputation (*Gee v. Prichard*, 2 Swan. 402—*Scrutton*). It is not a sufficient justification of such publication that the recipient thinks it necessary for the purpose of vindicating his character (*Gee v. Prichard*, *sup.*).

**Damages.**—The wrongful publication of private letters, manuscripts &c., being an invasion of the right of property, at least nominal damages may be always given; where there is shown to have been wrongful loss to the plaintiff, or gain to the defendant, the damages may be substantial; and where the publication was from motives of malice or insult the damages ought to be exemplary (*Collett*).

### 3. LECTURES.

The author of a literary composition delivered as a lecture to a selected number or limited class of persons will, until he has published his lecture, have a Common law right to prevent publication of it by others (*Caird v. Sime*, 12 App. Cas. 326). The understanding between him and his auditors being that they may avail themselves of what they hear for their own benefit, but not reproduce it for the outside public (*Nicols v. Pitman*, 26 Ch. D. 374). So it has been held that the public performance of a play does not amount to its publication as a literary composition (*Macklin v. Richardson*, 2 Amb. 694). On the other hand, a speech, sermon, address, or lecture, may be addressed to the public at large, and its delivery under such circumstances will be a publication depriving the author of any right at Common law and leaving him only his statutory copyright (*C. & L.*, 588). A person who makes notes of a speech delivered in public, transcribes them, and publishes in a newspaper a verbatim report of the speech, is the “author” of the report within the meaning of the Copyright

Act 1842, and is entitled to the copyright in the report and can assign the copyright (*Walter v. Lane*, (1900) A. C. 539). After lectures are published the author's rights will depend upon the Act for preventing the publication of lectures without consent (5 & 6 Will. IV, c. 65).

#### 4. DRAMATIC COPYRIGHT..

The interest which the author of a dramatic composition has in his work is of a two-fold nature. There is, first, the right of multiplying copies—the literary copyright, and, secondly, the more important right of performance and representation. This latter right was first recognised by 3 & 4 Will. IV, c. 15. The period of stage right in dramatic piece is extended to the full term allowed for literary copyright, dating from their first public representation (5 & 6 Vic. c. 45, s. 20).

#### 5. MUSICAL COPYRIGHT.

The author of a musical composition and his assigns have the sole right of performing such compositions in public for forty-two years from the first performance, or for the life of the author and seven years after his death, whichever shall be the longest term (45 & 46 Vic. c. 40, The Musical Copyright Act).

#### 6. UNPUBLISHED WORKS OF ART AND LITERATURE.

The owner of a picture, engraving, drawing, photograph, sculpture, or other work of fine art, has a right before publication to prevent any copy being made of it (*Turner v. Robinson*, 10 Ir. Ch. Rep. 121 ; *Prince Albert v. Strange*, 1 M. & G. 252). The painter of a picture has a right at Common law to restrain people from copying his picture, and he does not lose this right by exhibiting it to the public on the expressed or implied terms that they are simply to view and not to copy (*Turner v. Robinson*, 10 Ir.

Ch. 121). So long as a man keeps his literary or artistic property unpublished to the world at large, any violation to the privacy which he chooses to maintain is a wrong. Copyright after publication rests exclusively on the statute law. Paintings, drawings and photographs are protected by statute 25 & 26 Vic. c. 68; sculptures and models, by 38 Geo. III, c. 71 and 54 Geo. III, c. 56; and engravings by, 8 Geo. II, c. 13; 7 Geo. III, c. 38 and 17 Geo. III, c. 57.

Queen Victoria and Prince Albert had been in the habit of making etchings and drawings for their own amusement, and of having copies struck off from the etched plates by the workmen. They had no intention of publishing these works, and designed the copies for their private use and for presentation to a few intimate friends. The workman, they employed, struck off copies on his own account, and retained them; he afterwards parted with the collection he had thus formed, which finally came into the hands of one Mr. Strange, who proposed to exhibit it to the public and to publish a descriptive catalogue. Prince Albert applied for an injunction as to both the exhibition and the catalogue, and this was granted. On appeal, the Lord Chancellor laid stress also on the breach of trust in the workman who printed the copies in retaining some impressions for himself, and finally granted the injunction on both grounds, the right of property infringed and the breach of trust (*Prince Albert v. Strange*, 2 De G. & Sm. 652). Where a person has been employed to copy a drawing, or to take a photograph, it is an abuse of confidence for him to publish, or sell or exhibit copies of such drawing or photo, and he will be restrained from doing so (*Tuck v. Priester*, 19 Q. B. D. 629; *Pollard v. Photo &c. Co.*, 14 Ch. D. 245).

*Indian case.*—An author or composer of any work unpublished or kept for his private use has a property in it: and to publish that work or composition without his consent constitutes a good cause of action. But if the writer of a document read it in Court in the course of litigation, and allow it to go upon the file, he deprives himself of all right to consider its contents in feature as his private property. All that is done by or said to a Judge in open Court is public, as well as to those who are absent as to those who happen to be present (*Leitner v. Plowden*, P. R. 45 of 1868).

### 3. *Trade-mark and Property-mark.*

A trade mark is some symbol, consisting in general of a picture, label, word, or words, which is applied or attach-

ed to a trader's goods so as to distinguish them from the similar goods of other traders, and to identify them as his goods, or as those of his successors in the business in which they are produced or put forward for sale (per Lord Westbury in *Leather Cloth Co. v. American Leather Cloth Co.*, 4 De G. 142; *Richard v. Butcher*, (1891) 2 Ch. 532). To constitute a mark a trade-mark, it must have been adopted as a symbol devised to distinguish a particular class of goods as the goods of that class manufactured or selected by a particular manufacturer or merchant (*Laver-gne v. Hooper*, 8 Mad. 149).

A mark used for denoting that goods are the manufacture or merchandise of a particular person is called a *trade-mark* (I. P. C. s. 478); and a mark used for denoting that movable property belongs to a particular person is called a *property mark* (I. P. C. s. 479). The distinction between a *trade-mark* and a *property-mark* is, that the former denotes the manufacture or quality of the goods to which it is attached, and the latter denotes the ownership of them; or more briefly, the former concerns the goods themselves, the latter the proprietor of them.

When one knowing that goods are not made by a particular trader sells them as and for the goods of that trader, he does that which injures that trader (per Lord Blackburn in *Singer Manu. Co. v. Loog*, 8 App. Cas. 29). No man is entitled to represent his goods as being the goods of another man; and no man is permitted to use any mark, sign or symbol, device or means, whereby without making a direct false representation himself to a purchaser who purchases from him, he enables such purchaser to tell a lie or to make a false representation to some body else who is the ultimate customer (per James, L. J., *ib.*). The right of exclusive user of a name is not an absolute and unqualified right which would entitle the owner to



prevent another person from using it under all circumstances. It is only when the use of the name *deceives* or is reasonably *likely to deceive* the public that it can be interfered with or prevented. The same limitation must apply to the right of exclusive user of a number...To constitute an infringement it is not enough to show a *mere possibility* of deception. There must be a *reasonable probability* of purchasers being deceived (per Sale, J., in *Barlow v. Govindram*, 24 Cal. 364).

Trade-marks have been divided into two classes—local, denoting where the goods were manufactured; and personal or those which denote the person who manufactures them (per Lord Romilly, M. R., in *Hall v. Barrows*, 32 L. J. Ch. 551); but to these may be added a third class, which may be called symbolical trade-marks, as, for instance, the figure of a crown, an elephant; a fourth class, when fancy names are used to distinguish the goods (*Browne v. Freeman*, 12 W. R. 305; *Braham v. Bustard*, 1 H. & M. 447; *Young v. Macrae*, 9 Jur. N. S. 322); and there is a fifth class, where the mark may be more or less compounded of all, or some of the other classes (*The Leather Cloth Company v. The American Leather cloth Company*, 11 H. L. 520; *Sexio v. Provezende*, L. R. 1 Ch. App. 193—*Tudor*).

Property in a trade-mark cannot be acquired before the vendible articles bearing the name have actually been put upon the market for the purposes of sale (*Maxwell v. Hogg*, L. R. 2 Ch. App. 307).

A distinctive mark may be adopted by a person who is not the manufacturer, but the importer of the goods, and he will acquire the property in that mark as indicating that all goods which bear it have been imported by him. The circumstance that he has only imported them into one market does not deprive him of his property in the mark in other markets (*Lavergne v. Hooper*, 8 Mad. 149; *Ralli v.*

*Fleming*, 3 Cal. 417; *Ibrahim v. Essa*, 24 Mad. 163). An importer can only protect a trade-mark representing his own reputation and the advantages accruing therefrom, but not the trade-mark of another, a manufacturer or producer. He is not in the legal sense aggrieved at any use of the trade-mark which belongs not to himself but to the producer. An importer can only protect marks indicating importation by him. If his importation is not indicated by the mark but otherwise, as for instance by the style and name under which he trades as importer, he cannot sue to restrain the use of the marks and can only sue if his trade name and style were deceitfully assumed by a rival (*Heiniger v. Droz*, 3 Bom. L. R. 1; 25 Bom. 433).

**Determination.**—The right of the proprietor is determined if the mark ceases to be distinctive and becomes *publici juris*, for instance, by general piracy (*Ford v. Foster*, L. R. 7 Ch. 611; *National Starch Co. v. Munns etc. Co.*, (1894) A. C. 275); by being used by the proprietor for spurious goods (*Wood v. Lambert*, 31 Ch. D.); by becoming the name of the goods, and so merely descriptive (*Lenolium Manu. Co. v. Nairn*, 7 Ch. D. 834; *Magnolia Metal Co.*, (1897) 2 Ch. 371); or if it is abandoned (*Monson v. Bochen*, 26 Ch. D. 387).

**Infringement.**—The use of a mark so similar as to lead or be likely to lead purchasers to buy the goods marked therewith under the impression that they are the goods of the original manufacturer whose mark they bear, is an infringement of that mark (*Cape v. Evans*, L. R. 18 Eq. 138), although the marks are so different that any one seeing them side by side will not be misled (*Sexio v. Provezende*, L. R. 1 Ch. 192). Actual physical resemblance of the two marks is not to be the sole question for consideration (*Croft v. Day*, Tudor L. C. 142). The question is whether there is such a resemblance as was either intended, or is calcula-

ted to deceive ordinary persons, so as to induce them to purchase defendant's goods under the supposition that they are goods of the plaintiff; if so, no special damage need be proved (*Rogers v. Novill*, 5 C. B. 109; *Ewing v. Grant*, 2 Hyde 185; *Balfour v. Kilburn*, 1 Hyde 270). The test is the impression likely to be produced on the casual and unwary customer (per Lord Selborne in *Singer Manu. Co. v. Loog*, 8 App. Cas. 18). It is enough if one of the designs is an obvious imitation of the other. The eye must be the judge and the questions must be determined by placing the designs side by side and asking whether they are the same or whether the one is an obvious imitation of the other, and differences in detail will not make an obvious imitation the less an infringement (*John Harper & Co. v. Wright & Butler &c. Co.*, (1896) 1 Ch. 142).

There are three classes of cases in which the Court gives relief—

(1). To those of imitation of the *entire* trade-marks about which no question could arise.

(2). To imitation so nearly resembling the original as to be *colourable* though not fraudulently so (*Millington v. Fox*, L. R. 1 Ch. Ap. 196). It is quite possible for a label no part of which is a copy of another label to be a colourable imitation of that other label, and to be so like it in general appearance as to be likely to deceive purchasers (*Badische v. Manekji*, 17 Bom. 584). What one has to look at, in cases of colourable imitation of trade-marks, is not whether a critical and astute purchaser seeing the two labels side by side would be able to detect the difference, but whether the distinctive and characteristic symbol is the same in both cases so that one is likely to be taken for the other. It is immaterial whether there are slight differences which could be detected on a close scrutiny. Trade-marks appeal for the most part to the illiterate classes who are unable to

read or would be unlikely to spell out the descriptions round the borders (*Sassoon v. Damodar & Co.*, 1 Bom. L. R. 291).

(3). To a class of cases where the entire original was not very *closely* copied. If the goods of a manufacturer have, from the mark or device he has used, become known in the market by a particular name, the adoption by a rival trader of any mark which will cause his goods to bear the same name in the market may be as much a violation of the rights of that rival as the actual copy of the device (*Sexio v. Provezende*, *sup.*; see also, *Reddaway v. Benham*, (1895) 2 Q. B. 286; *Hanfstaengl v. Empire Palace*, (1894) 2 Ch. 1; see *Badische v. Manekjee*, 17 Bom. 584). No action or suit in respect of improper use of a trade name or a trade-mark can be maintained unless there is a *false representation* (per Mellish, L. J., *Singer Manu. Co. v. Wilson*, 2 Ch. D. 455). If the same mark is applied to a different kind of article it is not an infringement (*Collins v. Brown*, 3 K. & J. 423).

At Common law the question is whether or not the assumption of the mark is or is not calculated to deceive the public. If it is, then the defendant will be restrained from continuing the use of the mark; for, having learned that it is deceptive in fact, perseverance in its use would become fraudulent in intent. A right to damages would necessitate proof of fraudulent intent before action is brought. According to the statutory right a person can restrain another without reference to the question whether or not the goods are sold under such circumstances as to pass them off as the goods of the plaintiff (*Mitchell v. Henry*, 15 Ch. D. 193).

In an action for infringement of a trade-mark where the infringement is not an actual copy of the mark, the plaintiff must prove actual deception or probability of de-

ception (*Lambert v. Goodbody*, 18 T. L. R. 394).

For the purposes of a civil remedy, the invasion is none the less, though the false trade-mark is used unwittingly or innocently (*Graham & Co. v. Kerr Dods & Co.*, 3 B. L. R. AP. 4), but for criminal liability the invasion must be intentional in the sense of fraudulent; for a use of the same mark, even knowingly, but under an honest belief of a right to use it, would not be criminal.

The plaintiff had adopted, as his trade-mark, the figure of an ox on the frank of which were printed the words "Durham," the name of the plaintiff being printed above the word "Durham" and the word "Mustard" below. The defendants, who were also mustard manufacturers, used a similar ox, but without the words "Durham" and "Mustard," but having the name "Taylor" printed below. Held, that the defendants' mark was so similar as to be likely to deceive intending purchasers (*Harrison v. Taylor*, 11 Jur. N. S. 408). Where the inventor of a sauce sold it in wrappers whereon it was called "The Original Reading sauce," and the defendant brought out a sauce which he called "Chandler's Original Reading sauce," he was restrained from doing so for the future (*Cox v. Chandler*, L. R. 11 Eq. 446). If A and B purchase the same article in bulk from the same manufacturer, and A places it on the market in a special wrapper which has become well-known in the trade, B will be restrained from using a similar wrapper (*Knott v. Marshall*, (1894) W. N. 214). Where a trade-mark of a firm selling condensed milk consisted partly of a figure of a dairy-maid, but the word "Dairy-maid" was not used on the mark, nevertheless people commonly called it the "Dairy-maid" brand, it was held an infringement to sell condensed milk under a trade-mark using the word "Dairy-maid," but not the figure (*Anglo Swiss Co. v. Metcalfe*, 31 Ch. D. 454). The words "Parchment Bank" as applied to a note paper, are descriptive (*Pierie v. Goodall*, (1891) 8 R. P. C. 261); so also, the words "Pain-killer" have been held merely descriptive of the quality of a patent medicine, and not 'special and distinctive' (*Perry &c. v. Harboard*, 15 App. Cas. 316). In *Eno v. Dunn* (15 App. Cas. 252), Lord Herschell said: "If it were proposed so to employ the words 'Fruit Salt' that no reasonable person could suppose that they had reference to the appellant's preparation, such a use would be perfectly unobjectionable. I think it is enough to say that I am not satisfied that there would be no reasonable danger of the public being so deceived." The word 'Bovril' as applied to beef extracts is a fancy word (*In re Johnston's Trade-mark*, 12 T. L. R. 467). A word is not incapable of registration as a trade-mark merely because it is a geographical

name if its primary meaning is something different (*In re Magnolia Metal Co.*, 13 T. L. R. 242).

*Indian cases.*—In a suit brought by the plaintiff to restrain the defendants from using an imitation of the plaintiff's trade-mark, it was held that if the imitation of the plaintiff's marks generally, or the use of the number 2008 in particular, would be calculated to deceive or mislead the public, the defendants ought to be restrained from such use or imitation, and that under the circumstances the use of their marks by the defendants would be calculated to deceive the public into the belief that they are purchasing goods imported by the plaintiffs (*Ralli v. Fleming*, 3 Cal. 417). Where the defendant adopted a new label, different in some respects from the picture on the plaintiffs' label and with new surroundings to none of which taken separately did the plaintiffs object but they complained that in its general effect the new label was so similar to their trade-mark as to amount to a colorable imitation thereof, and to be likely to deceive purchasers. Held, that the defendants were entitled to an injunction against the defendants. "The question in a case of this description is not what would be the effect on brokers or even dealers in Bombay, but how the label would be likely to strike incautious or unwary purchasers, such as are to be found more particularly in the mofussil" (per Sargent, C. J., in *Badische v. Manekji*, 17 Bom. 585). The plaintiff, an inkseller, who had not taken out any patent for a specialty in ink sued for and obtained an injunction, against defendant who was also dealing in the same trade from using a colourable imitation of his label, which he claimed to have had registered as his trade-mark in the Trademarks Branch of the Patent Office in London. The defendant's label had an almost identical appearance, but the name of the firm was different and the wording altered. Held, that an injunction ought not to have been granted. The use of a similar label by a person under his own name does not show any design on his part to pass off his article as that of another unless fraud on his part is proved. The colour and size of a label cannot be regarded as a constituent part of a trade-mark (*Muhammad Ishaq v. Alif Khan*, P. R. 55 of 1902). No trader importing goods can lawfully adopt a trademark which is calculated to cause his goods to bear in the market the same name as those of a rival trader (*Taylor v. Virasami*, 6 Mad. 108). Civil action can be brought though a criminal prosecution is barred under the Merchandise Marks Act (IV of 1889) (*Ruppell v. Ponnusami*, 22 Mad. 488).

**Damages.**—The measure of damages which can be recovered in the case of a pirated trade-mark is not yet settled by authority (*Sebastian*, 213). It is, however, clear that the plaintiff can recover for the loss of profit which he can

prove to have arisen directly from the defendant's wrongful conduct in pirating his trade-mark. Loss of profits can be caused evidently in two ways:—“(1). By diminishing the amount of the goods sold by the plaintiff, by taking away his customers, or ousting him from the usual market, or in some similar way. (2). By causing the goods actually sold by the plaintiff to be sold at a diminished price. If the loss of profits can be directly traced to the action of the defendant, there is no reason why he should not be liable for loss caused in the latter way as well as in the former. There would seem to be no difference in principle. In the latter case, the reduction in the price of the goods sold would be the measure of the loss of the plaintiff. If the plaintiff were working at an extremely small profit, such reduction in price would cause him not loss of profit, but actual loss out of pocket. Here, again, there is no distinction, in principle, between the two classes of loss” (per Farran, J., in *The Manekji Petit Manufacturing Co. Ltd. v. The Mahalaxmi Spinning and Weaving Co. Ltd.*, 10 Bom. p. 630).

It has been decided that special damage, by loss of custom or otherwise, must be proved, where a trade-mark has been used; and it cannot be assumed that the goods sold by the defendant would have been sold by the plaintiff, but for the defendant's unlawful use of his trade-mark (*Leather Cloth Company v. Hirschfield*, L. R. 1 Eq. 299). But the plaintiff is, at least, entitled to *nominal* damages even when he has been unable to prove any particular amount of loss. His custom is any how diminished to an undetermined extent by other goods being sold as his, though they may be as good as his and so his reputation may not be hurt; and hence in such a case it would not be wrong to give *substantial* damages. Compensation may be fixed either by taking an account of such wrongful

sales, or by a lump sum as damages. The damages may not be altogether capable of calculation, as the measure may be the loss of sale to the plaintiff, and the injury done to the reputation of his business or merchandise (*Sedgwick*). If the plaintiff be able to prove any general loss of custom, it may be right to consider also the demand for such goods, and the length of time during which defendant has misused the mark, and to give *substantial*, or where there has been a fraudulent misuse, *exemplary* damages.

Where the infringement of the plaintiff's trade-mark by the defendants caused a loss of profit to the plaintiffs, not by diminishing the amount of goods sold by the plaintiff or by taking away their customers or ousting them from their usual market, but by causing the goods actually sold by the plaintiffs to be sold at a diminished price; it was held that the defendants were liable for the loss sustained by the plaintiffs, and that the amount of the reduction in the price of the goods sold was the measure of damages (*The Maneckjee &c. Co. v. The Mahalaxmi &c. Co., sup.*).

**Injunction.**—To justify an injunction it is not necessary to adduce instances in which deception has occurred, the law is content with proof of acts likely to deceive (*Jay v. Ladler*, 40 Ch. D. 656; *Reddaway v. Benham*, (1892) 2 Q. B. 644; *Bullivant v. Wright*, 13 T. L. R. 201). A trade-mark in India is a species of property in respect of which an injunction may issue, and although there is no special law regarding trade-marks as in England, plaintiff has his remedy under the Specific Relief Act (I of 1877) (*Mahammad v. Alif Khan*, 3 Panj. L. R. 376). A person who uses a label which is a deliberate combination of other registered labels with a view to represent and sell his wares as the wares of others, cannot be allowed to take out an injunction restraining some other person from imitating his label (*Abdul v. Mahomedally*, 3 Bom. L. R. 220).

#### 4. Tradename.

A tradename may be either the name of the manufacturer of goods or some name by which the manufactured



goods have become generally known. There is a kind of property in such a name, and interference with it will be restrained by the Court if there is a prospect of injury to the owner of it (*Borthwick v. Evening Post*, 37 Ch. D. 449). A trader is not entitled to pass off his goods as the goods of another trader by selling them under a name which is likely to deceive purchasers (whether immediate or ultimate) into the belief that they are buying the goods of that other trader, although in its primary meaning the name is merely a true description of the goods (*Reddaway v. Benham*, (1896) A. C. 199; *Parsons v. Gillespie*, (1898) A. C. 239). The wrong consists in any other person selling goods of his own in such a way as to lead the public to suppose that they are purchasing some one else's goods.

The question whether a name applied to a patented or other article constitutes a tradename, indicating the manufacturer, or has come to be regarded as the proper designation of the article itself, and therefore open to the whole world is a question of evidence in each particular case (*Singer v. Wilson*, 3 App. Cas. 376).

The principle that "nobody has any right to represent his goods as the goods of somebody else" (*Reddaway v. Benham*), has no limit as regards name, origin, honesty of manufacture or sale, or otherwise. Thus, a trader whose goods have acquired a reputation under a particular name can restrain the user of that name in any way whatever by a rival trader in connection with the latter's own goods, even though that reputation has been acquired by the exertions or enterprise of the rival trader as an importer and vendor on behalf of the plaintiff (*Saxlehner v. Appollinaris Co.*, (1897) 1 Ch. 893).

A man whose goods have acquired a reputation, in connection with the distinctive tradename attached to them, has a right to protect himself from the fraudulent appro-

priation of that tradename by another trader in the same or similar class of goods (*Goodfellow v. Prince*, 35 Ch. D. 9). The defendant adopting the tradename and imitating the get up of the plaintiff's goods, may be liable on the ground of fraud, though the plaintiff has no exclusive right to the name (*Lever v. Goodwin*, 4 R. P. C. 492). Mere similarity of name is not sufficient ground for an injunction, unless damages to the plaintiff be clearly proved, or the name is so closely similar as to be a colourable imitation of the plaintiff's (*Borthwick v. The Evening Post*, 37 Ch. D. 449). The Court will not restrain a man from trading in his own name except where he uses his name in such a way as to pass off his goods as the goods of another (*Jamieson v. Jamieson*, 18 T. L. R. 160; *Mancherjee v. Framji*, 2 Bom. L. R. 1026). But where a tradename is merely descriptive of the article, whether originally a descriptive name or not, and does not designate manufacture by any particular firm, it cannot any longer be exclusively retained by the original maker, but may be adopted by any other trader (*Native Guano Co. v. Sewage Manure Co.*, 4 R. P. C. 473).

**Name of goods.**—The plaintiff had for some years made belting and sold it as "Camel Hair Belting," a name which had come to mean in the trade the plaintiff's belting and nothing else. The defendants began to sell belting made of the yarn of camel's hair, and stamped it "Camel Hair Belting" so as to be likely to mislead purchasers into the belief that it was the plaintiff's belting, endeavouring thus to pass off his goods as the plaintiff's. Held, that the plaintiff was entitled to an injunction restraining the defendant from using the words "camel hair" as descriptive of or in connection with belting made or sold or offered for sale by him and not manufactured by the plaintiff without clearly distinguishing such belting from the plaintiff's belting (*Reddaway v. Benham*, *sup.*). The plaintiff was held entitled to restrain the defendants from passing off by the use of the term "Yorkshire Relish" sauce not of the manufacture of the plaintiff as or for the goods of the plaintiff (*Powell v. The Birmingham Vinegar Brewery Co.*, (1894) 3 Ch. 449). The plaintiffs were selling timber which they were importing from their estate in Western Australia, under the name of "Jarrahdale jarrah," and the timber had acquired that name

in the market. The defendants began to sell under the same name. In an action, an injunction was granted restraining the defendant from selling any timber not imported from the plaintiff's estate as "Jarrahdale jarrah" timber (*The R. R. Co. v. J. Timber Co.*, 13 T. L. R. 80). Even a geographical name, e. g., "Stone" ale, used for ale manufactured by the plaintiff at Stone, will be protected from a similar name, adopted by the defendant a new brewer at the same place (*Joules &c. v. Montgomery*, (1891) A. C. 217). A particular starch, which was first made in a village called Glenfield, was given the name of Glenfield Double Refined Powdered Starch, and acquired a great reputation as Glenfield Starch. Its manufacture was then removed to another place, but the name was preserved. Another manufacturer, named Currie, then set up in Glenfield, and on his labels he described the article, as Double Refined Powdered Starch, Currie and Co., starch and corn manufacturers, Glenfield. The latter word was put at the bottom of the label instead of at the top, as in the plaintiff's label, and there were other minor differences. It was held by the House of Lords that the difference was merely colourable, the object being to induce the public to purchase the defendant's starch as being the original Glenfield starch (*Wotherspoon v. Currie*, 5 H. L. 514). When a favourite yarn shipped to India had obtained the name of "Be-hathic" yarn, from two elephants which were prominent on the labels, and a rival manufacturer used a label similar in colour and shape, and also bearing upon it two elephants, the Court prohibited its use as a fraudulent imitation, though the labels when put side by side were really distinguishable (*Johnston v. Orr Ewing*, 7 App. Cas. 219). The plaintiff had introduced into market a superior white soft soap, which they sold under the name of "The Excelsior white soft soap." It was admitted that white soft soap, as a chemical product, had been known for a long time; but it was asserted and proved that there was little or no demand for it in the market until after the plaintiffs had introduced it; and that, for commercial purposes, it was thus a substantially new article. The defendants subsequently began to manufacture, and sold soap under the name of "Bustard and Co's Excelsior white soft soap." In an action, an injunction was granted to restrain the defendants from selling, advertising, or exposing for sale, any soap under the name of "Excelsior white soap" or any words so contrived as to represent or lead to the belief that the articles sold by the defendants were the plaintiffs' article or manufacture. "If the defendants had not desired to obtain an unfair advantage of the reputation of the plaintiffs' goods, they should have called their soap "Victoria white soft soap," or "Royal white soft soap," or by some similar name" (per Sir Page Wood, V. C., in *Braham v. Bustard*, 1 H. & M. 447.\* See also, *Southern v. How*, Pop. 144; *Blofeld v. Payne*, 4 B. & Ad. 410; *Sykes v. Sykes*, 5 D. & R. 292; *Morison v. Salmon*, 2 M. &

G. 385; *Singleton v. Bolton*, 3 Doug. 293; *Crawshaw v. Thompson*, 5 Scott N. R. 562). The use by the defendant of a similar title to a newspaper or almanac to that sold by the plaintiff with a view to mislead the public (*Spottiswoode v. Clerk*, 2 Ph. 154); the use of a similar name for a hotel for a like purpose (*Howard v. Henriques*, 3 Sandf. 725); the use of a similar name or style for a shop or firm of merchants carrying on the same business (*Lewis v. Langdon*, 7 Sim. 421; *Weinstock v. Marks*, 42 Pac. Rep. 142) may be restrained by injunction, and damages may be awarded for any loss occasioned by the wrong.

**Descriptive name.**—Plaintiff claimed to have put upon the market a fabric suitable for shirtings and underwear, woven in a particular manner, called “cellular cloth.” Defendants began to sell cotton and woollen goods described as “cellular.” Held, that the word “cellular” was an ordinary English word which appropriately and conveniently described the cloth of which the goods sold by the defendants were manufactured, and that the term had not been proved to have acquired a secondary meaning so as to denote only the goods of the plaintiffs (*Cellular Cloth Co. v. Maxton*, (1899) A. C. 326). An injunction was granted restraining the defendants from selling any corsets not of plaintiffs manufacture under the name of “erect form corsets” without clearly distinguishing such corsets from those of the plaintiffs (*Weingarten Bros. v. Charles Bayer & Co.*, 19 T. L. R. 238).

**Name of firm.**—A blacking manufactory had long been carried on under the firm of Day and Martin. The executors of the survivor continued the business under the same name. A person of the name Day having obtained the authority of one Martin to use his name, set up the same trade and sold blacking as of the manufacture of Day and Martin, in bottles and with labels having a general resemblance to those of the original firm. He was restrained by injunction (*Croft v. Day*, Tud. L. C. 566). The plaintiff, as executor, carried on the business of one J. Thorley, who had for a long time manufactured by a secret process a material which he sold as Thorley’s Food for Cattle; and on his death a rival company was started in which J. W. Thorley, a brother of J. Thorley and possessed of his secret, was a small shareholder and manager. This company sold packages made to resemble those of the plaintiff’s, which they labelled “Thorley’s Food for Cattle.” It was considered in the first place that the plaintiff had a right good against the world in general to the use of the term in question, and that although this right did not extend so far as to enable him to prevent J. W. Thorley from selling the same food under his own name, yet the latter must not do so fraudulently, in such a manner as to make the public think when purchasing his food that they were getting the manufacture of the plaintiff (*Massam v. Thorley’s Cattle Food Co.*, 14 Ch. D. 748). The defendants started a firm for selling pianos under the name of “Thomas

Edward Brinsmead and Son Ltd.," in competition with the plaintiff's old firm "John Brinsmead and Sons" who were dealing in pianos. In an action, the Court granted an injunction restraining the defendants from using the name of Brinsmead, in connection with the manufacture, sale, or hire of pianos, without adding thereto an express statement that the defendant company are distinct from and have no connection with the plaintiff's firm. "The question in such a case was not whether those who were in the secrets of the trade would be deceived, but whether the ultimate purchasers of pianos would be deceived" (per Lindley, L. J., in *Brinsmead v. Brinsmead*, 13 T.L.R.3). The "Manchester Brewery Co." had carried on business under that name for years. The defendants bought an old business called "The North Cheshire Brewery Co." and then (without intending to deceive) got themselves registered as "The North Cheshire and Manchester Brewery Co." Held, that this name was calculated to deceive and the defendants should be restrained by injunction (*North Cheshire and Manchester Brewery Co. v. Manchester Brewery Co.*, (1899) A. C. 83). A company was incorporated in Canada under the title of the Sun Life Assurance Co. of Canada. Held, that in the absence of fraud and dishonesty the company were entitled to carry on business under their corporate name in England, notwithstanding the existence of the Sun Life Assurance Co. (*Saunders v. Sun Life Assu. Co. of Canada*, (1894) 1 Ch. 537). "Jamieson's Whiskey" is a trade name (*Jamieson v. Dublin Distillers Co.*, (1900) 1 I. R. 43). The London General Omnibus company prayed for an injunction to restrain the defendant from running omnibus having painted &c. thereon words, panels, or devices in colourable imitation of those on the plaintiff's omnibuses, or so painted, lettered and contrived as to represent or lead to the belief that the defendant's omnibuses were the plaintiff's omnibuses and an injunction was granted (*The London G. O. Co. v. Felton*, 12 T. L. R. 213).

*Indian case.*—Where the partners at the time of dissolving the partnership make no stipulation about good-will, every one of the partners has a right to carry on the trade in the identical name under which the firm had traded prior to the dissolution; because the good-will of the business is an asset of the partnership, to which one member of the firm has no higher right than the other (*Muncherji v. Framji*, 2 Bom. L. R. 1026).

**Trademark and Tradename.**—There is a distinction between a trademark and a tradename. "A name may be so appropriated by use, as to come to mean the goods of the plaintiffs, though it is not, and never was, impressed on the goods, or on the packages in which they are contained, so as to be a trademark properly so-called, or within

the written statutes. Where it is established that such a tradename bears that meaning, I think, the use of that name, or one so nearly resembling it, as to be likely to deceive, as applicable to goods not the plaintiffs', may be the means of passing off those goods as and for the plaintiffs,' just as much as the use of a trademark; and I think the law, so far as not altered by legislation, is the same" (per Lord Blackburn in *Singer Manufac. Co. v. Loog*, 8 Ap. Ca. 32). One main difference between trademarks and tradenames is that a trader has a right of property in the former if registered, but not in the latter, except where used as a trademark (*Bewes*).

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# TORTS to PERSON & PROPERTY.

## CHAPTER XIX.

### FRAUD AND MISREPRESENTATION.

FRAUD consists in leading a man into damage by wilfully or recklessly causing him to believe and act on a falsehood (*Kerr*, 17). If a falsehood be knowingly told, with an intention that another person should believe it to be true, and act upon it, and that person has acted upon it, and thereby suffered damage, the party telling the falsehood is responsible in damages in an action for deceit there being a conjunction of wrong and loss, entitling the injured party to compensation (*Paseley v. Freeman*, 2 Sm. L. C. 71). Fraud, in the contemplation of a civil Court of justice, may be said to include properly all acts, omissions and concealments which involve a breach of legal or equitable duty, trust, or confidence, justly reposed, and are injurious to another, or by which an undue or unconscientious advantage is taken of another. All surprise, trick, cunning, dissembling, and other unfair way that is used to cheat any one is considered as fraud. Fraud in all cases implies a wilful act on the part of any one, whereby another is sought to be deprived, by illegal or inequitable means, of what he is entitled to (*Green v. Nixon*, 23 Beav. 535—*Kerr*, 2).

In the leading case of *Derry v. Peek* (14 App. Cas. p. 394), Lord Herschell said :—

“ 1. In order to sustain an action of deceit, there must be proof of fraud and thing short of that will suffice.

2. Fraud is proved when it is shown that a false representation has been made (1) knowingly, or (2) without belief in its truth, or (3) recklessly, careless whether it be

true or false...To prevent a false statement being fraudulent, there must, I think, always be an honest belief in its truth ...for one who knowingly alleges that which is false has obviously no such honest belief.

3. If fraud be proved, the *motive* of the person guilty of it is *immaterial*. It matters not that there was no intention to cheat or injure the person to whom the statement was made...

In my opinion making a false statement through want of care falls far short of, and is a very different thing from, fraud, and the same may be said of a false representation honestly believed though on insufficient grounds." (See also, *Angus v. Clifford*, (1891) 2 Ch. 449; *Low v. Bouverie* (1891) 3 Ch. 82; *Le Lievere v. Gould*, (1893) 1 Q. B. 491).

Thus, to create a right of action for deceit there must be a fraudulent representation; and a representation in order to be fraudulent must be one—

(1) which is untrue in fact;  
 (2) which defendant knows to be untrue or is indifferent as to its truth (*Derry v. Peek*, *sup.*).

(3) which was intended or calculated to induce plaintiff to act upon it (*Polhill v. Walter*, 3 B. & Ad. 114); and

(4) which the plaintiff acts upon and suffers damage (*Barry v. Croskey*, 2 J. & H. 22).

1. **Falsehood.**—There must be an **active attempt** to deceive by a statement which is false in fact and fraudulent in intent. The representation must be a representation of fact. A mere expression of opinion, which turns out to be unfounded is not sufficient. There is a wide difference between the vendor of property saying that it is worth so much, and his saying that he gave so much for it; the first is an opinion which the buyer may adopt if he will, the second is an assertion of fact which, if false to the knowledge of the seller is also fraudulent.



A suppression of the truth (*suppressio veri*) may amount to a suggestion of falsehood (*suggestio falsi*). Concealment of this kind is sometimes called, "active," "aggressive," or "industrious," but perhaps the word itself, as opposed to nondisclosure, suggests the active element of deceit which constitutes fraudulent misrepresentation. There must be such a partial and fragmentary statement of fact, as that the withholding of that which is not stated makes that which is stated absolutely false.

Mere silence with regard to a material fact will not give right of a action—

(a) unless active artificial means have been taken to prevent the other party from discovering the fact for himself; or

(b) unless the essence of the transaction implied confidence reposed in the party concealing, to divulge all material facts.

Non-disclosure when there is no duty to disclose is not fraud (*Ward v. Hobbs*, 4 App. Cas. 26; *Keats v. Lord Cadogan*, 20 L. J. C. P. 76).

**Defendant liable.**—The plaintiff was dealing in cochineal, and at the time when the cause of action arose had a large stock on hand which he was anxious to dispose of. The defendant learning of this told the plaintiff that he knew one Falch who would purchase the cochineal. The plaintiff said "Is he a respectable and substantial person?" "Certainly he is" answered the defendant, well knowing he was not of the sort. On the faith of this representation the plaintiff gave to Falch 16 bags of cochineal of the value of nearly £3,000, on credit. Upon the bill becoming due it turned out that Falch was insolvent, and being unable to recover his money from Falch, the plaintiff sued the defendant for making to him a false representation whereby he was damnified, and it was held that the defendant was liable to the plaintiff to the extent he had suffered in consequence of the former's false statement as to the credit and character of Falch (*Pasley v. Freeman*, 3 T. R. 51). The defendant sold a cow, fraudulently representing that it was free from infectious disease, and the plaintiff having placed the cow with five others, they caught the disease and died. It was held that the plaintiff was held entitled to recover as damages the value of all the cows, as their death was the natural

consequence of his acting on the faith of the defendant's representation (*Mullet v. Mason*, L. R. 1 C. P. 539). Where the vendor of a house, knowing of a defect in the wall, plastered it up and papered it over it was held that an action of deceit lay (*Pickering v. Dawson*, 4 Taunt. 785); so, too, where a ship was sold with "all fault" and the vendor knowing of a latent defect concealed it and made a fraudulent statement as to its condition (*Schneider v. Heath*, 3 Camp. 505).

**Defendant not liable.**—Defendant sent to a public market pigs which were to his knowledge suffering from typhoid fever, and to send them to market in this state was a breach of a penal statute. Plaintiff bought the pigs with "all faults," no representation being made as to their condition. The greater number died: other pigs belonging to plaintiffs were also infected. It was contended that the exposure of the pigs in the market amounted to a representation under the circumstances, that they were free from any contagious disease. It was held that no action lay; to say that every man is always to be taken to represent in his dealings with other men, that he is not to his knowledge violating any statute, is a refinement which would not appear reasonable to any man (*Ward v. Hobbs*, 3 Q. B. D. 150). The plaintiff sued for damages arising from the defendant's fraud in letting to the plaintiff a house for a term of years which he knew to be required for immediate occupation, without disclosing that it was in a ruinous condition; it was held that no such action will lie (*Keats v. Lord Cadogan*, 10 C. B. 591).

*Leading case.*—**Pasley v. Freeman.**

2. **Knowledge or ignorance.**—The representation must be made with knowledge of its falsehood or without belief in its truth. Unless this is so, a representation which is false gives no right of action to the party injured by it.

(1). No action for deceit lies upon a representation which the maker honestly believed to be true, however unreasonable the grounds of his belief (*Derry v. Peek*, 14 App. Cas. 337), even though he made it carelessly, without appreciating the importance and significance of the words used (*Angus v. Clifford*, (1891) 2 Ch. 449), for negligent misrepresentation does not amount to deceit, and can only give a cause of action where there is a duty to be careful, *i. e.*, not to give information except after careful inquiry (*Low v. Bouverie*, (1891) 3 Ch. 105, *Le Lievre v. Gould*,

(1893) 1 Q. B. 491; overruling *Smith v. Chadwick*, 20 Ch. D. 27 and *Western Bank of Scotland v. Addie*, L. R. 1 H. L. 162).

(2). If the representation is thought to be true at the time of making it; but is subsequently discovered to be false before the other party has acted upon it, it seems on principle that the defendant would be liable, if he suffers the other party to continue in error and act on the belief that no mistake had been made. The same rule holds if the representation was true when first made, but ceases to be true by reason of some event within the knowledge of the party making it and not within the knowledge of the party to whom it is made (*Traill v. Braing*, 4 De. G. J. & S. 318).

(3). As every one who makes a statement in order to induce another to act on it must be taken, at least, to represent that he does believe it, the action lies if he had no belief, but acted recklessly, careless whether the statement was true or false, provided he was conscious that he did not believe the statement (*Derry v. Peek*, *sup.*). If persons take upon themselves to make assertions as to which they are ignorant whether they are true or untrue, they must, in a civil point of view, be held as responsible as if they had asserted that which they knew to be untrue (per Lord Cairns in *Reese River Silver Mining Co. v. Smith*, 4 H. L. 64).

The defendant is not liable if he has forgotten the truth (*Low v. Bouverie*, *sup.*).

The *motive* of the person saying that which he knows not to be true to another with the intention to lead him to act on the faith of the statement is immaterial (*Smith v. Chadwick*, 9 App. Cas. 201).

**Defendant liable.**—Where the defendant accepted a bill of exchange drawn on A, representing that he had A's authority to do so, and honestly believing that the acceptance would be sanctioned and the bill met by A. The bill was

dishonoured ; it was held that, an action for deceit lay against the defendant by an indorsee for value. Absence of dishonest motive is no defence (*Polhill v. Walter*, 3 B. & Ad. 114). Where the defendant in answer to the plaintiff's letter asking him if he could recommend a man named T as a safe and responsible tenant, had "much pleasure in replying affirmatively" though he knew T to be a man of no resources, and that he had more than once failed in business similar to the one he now wished to enter into, it was held that it was of no consequence that what the defendant had said he said out of mere kindness and had no idea of making anything out of it, or even of deliberately deceiving the plaintiff. The defendant was not allowed to excuse himself by showing that he had nothing to gain by making the false representation (*Liddell v. McDougal*, 29 W. R. 403).

**Defendant not liable.**—The prospectus of a tramway company stated that the company had power to use steam. In fact it had not ; and the directors of the company knew it had not, but they believed that the power to use steam could be, and would be, obtained without difficulty and could not be refused. In this, however, they were mistaken. The House of Lords decided that an action for damages would not lie against a person for an untrue statement made by him, unless he was guilty of fraud ; and that he was not guilty of fraud if he honestly believed the statement to be substantially true though he might have no reasonable ground for his belief, and might have been guilty of some carelessness in making the statement (*Derry v. Peek*). Owing to this decision of the House of Lords, the Director's Liability Act (53 & 54 Vic. c. 64) was passed. Where a telegraph company by a mistake in the transmission of a message, caused the plaintiff to ship to England large quantities of barley which were not required, and which owing to a fall in the market, resulted in a heavy loss ; it was held that the representation not being false to the knowledge of the company, gave no right of action to the plaintiff (*Dickson v. Reuter's Telegraph Co.*, 3 C. P. D. 1). The defendant sold to the plaintiff a stone, which he affirmed to be Bezour stone, but which proved not to be so. It was held that no action lay against him unless he either knew that it was not Bezour stone, or had warranted it to be Bezour stone (*Chandelor v. Lopus*, 1 Sm. L. C. 183).

*Leading cases.*—**Derry v. Peek ; Chandelor v. Lopus.**

**3. Object.**—It is necessary that the misrepresentation should have been made in relation to the transaction in question, and with the direct intent to induce the party to whom it is immediately made, or a third party, to act in the way that occasions the injury (*Burnes v. Pennell*, 2 H. L. 497 ; *Smith v. Kay*, 7 H. L. 750 ; *Arnison v. Smith*, 41 Ch.

D. 348; *Barry v. Coskey*, 2 J. & H. 1). Whether the representation is made to the plaintiff, or to a third party, is immaterial, if it is false to the knowledge of the defendant, and has been made for the purpose of being communicated to the plaintiff (*Langridge v. Levy*, 2 M. & W. 530); or to a class of persons of whom the plaintiff is one, or even if it is made to the public generally with a view to its being acted on, and the plaintiff, as one of the public or of such class, acts on it (*Swift v. Winterbottom*, L. R. 8 Q. B. 244; *Swift v. Jewsbury*, L. R. 9 Q. B. 301; *Richardson v. Silvester*, L. R. 9 Q. B. 34).

Where the defendant sold a gun to the father of the plaintiff, for the use of himself and his sons representing that the gun was made by a well-known maker and safe to use, and a son used the gun, which exploded injuring his hand, it was held that the defendant was liable to the son, not on his warranty for there was no contract between them, but for the deceit (*Langridge v. Levy*, 2 M. & W. 519). A vendor of a lamp represented the lamp to be fit and proper to be used, knowing that it was not, and intending it to be used by the plaintiff's wife, the wife, joining her husband for conformity, was held entitled to an action for deceit, upon the principle that if any one knowingly told a falsehood with intent to induce another to do an act which resulted in his loss, he was liable to that person in an action for deceit (*Longmeil v. Holliday*, 6 Ex. D. 766; *George v. Skivington*, L. R. 5 Ex. 1). The plaintiff sent to the defendant some samples of printed handkerchiefs with a view to obtain orders from him. The defendant told him that the design he had printed was a registered one, and that the owner of it was going to proceed against him for an injunction. The plaintiff, in consequence, was put to considerable expense in proceeding to London to make inquiries. The statement was false. Another element of damage was that the defendant, having delayed the plaintiff's manufacture, made use of the design himself, and obtained the command of the market which the plaintiff would otherwise have had for his wares. There was an averment that the defendant knew the statement was false, and that he knowingly and wilfully uttered it; it was held that the plaintiff had stated a good cause of action (*Bailey v. Walford*, 9 Q. B. D. 197). If a train which has been taken off is announced as still running in the current time-table of a railway company, this is false representation and a person who by relying on it has missed an appointment and incurred loss may have an action for deceit (*Denton v. G. N. Ry.*, 5 E. & B. 860). Where a director of a company puts forth:

transferrable shares into the market, and publishes and circulates false statements and representation for the purpose of selling the shares, the false representation is deemed in law to be made to all persons who read the public announcements, and become purchasers of shares on the faith of the statements contained in them (*Scott v. Dixon*, 29 L. J. Ex. 62; *Barry v. Croskey*, 2 J. & H. 21). The defendant had inserted in a newspaper an advertisement that a certain farm was to be let with immediate possession. The plaintiff went down to see the farm, and incurred expense in examining the property. The defendant knew at the time he inserted the advertisement that he had not the power to let the farm, and that it was not to be let. It was held that this amounted to a false representation. "It was a false statement knowingly made and published in order to be read by persons who would be likely to be tenants of farms, and the natural consequence would be that a person who was desirous of becoming a tenant would, upon reading the advertisement, incur expense in looking at the farm, and this, it is alleged, is what the plaintiff did" (*Richardson v. Silvester*, L. R. 9 Q. B. 34).

*Prospectus cases*.—A prospectus for an intended company contained misrepresentation of facts known to the directors who issued it. Being addressed to the whole public, any one might take up the prospectus and appropriate to himself its representations, by applying for an allotment of shares. Held, that when the allotment was completed the office of the prospectus was exhausted, and that a person who had not become an allottee, but was only a subsequent purchaser of shares in the market, was not so connected with the prospectus as to render those who had issued it liable to indemnify him against the losses which he had suffered in consequence (*Peek v. Gurney*, L. R. 6 H. L. 377). But where a prospectus is issued not merely for the purpose of inviting persons to subscribe to shares, but also in order to induce persons to purchase the shares of the company in the open market, the office of the prospectus is not exhausted upon the allotment of shares; and a person who having received a prospectus, afterwards purchases shares in the open market relying upon false representations contained in such prospectus, has a cause of action against the promoters in respect of such false representations (*Andrews v. Mockford*, (1896) 1 Q. B. 372).

4. **Reliance**.—The plaintiff must show that he was deceived by the fraudulent statement and acted upon it to his prejudice (*Arkwright v. Newbold*, 17 Ch. D. 324).

Fraud without damage, or damage without fraud, gives no cause of action; but where these two concur, an action lies. Damage is a part of the cause of action. There is no action for a naked lie (*Paseley v. Freeman*, 2 Sm.

L. C. 71). It is enough if the fraudulent representation operates to the prejudice of a man to a very small extent. But to give a cause of action the damage must be the immediate and not the remote effect of the representation (*Barry v. Croskey*, 2 J. & H. 1). Misrepresentation which does not itself cause damage, but is merely incidental to some lawful act which does cause damage, is not actionable (*Ajello v. Worsley*, (1898) 1 Ch. 274).

The fact that the party deceived had the means at hand of finding out the truth is immaterial, if he makes no actual independent inquiry (*Dobell v. Stevens*, 3 B. & C. 623). A mere purfunctory inquiry on the part of the party deceived is not sufficient (*Redgrave v. Hurd*, 20 Ch. D. 1). But to escape liability the defendant may prove that the other party (1) knew the truth; or (2) relied wholly on his own investigation; or (3) was not really influenced in his conduct by the defendant's misrepresentation.

Where one fraudulently misrepresents the amount of his business, and the person to whom such representation is made, acting on the faith thereof, purchases it and is damnified, an action of deceit will lie against the vendor (*Dobell v. Stevens*, 3 B. & C. 623). But a mere careless statement as to the percentage of profits on capital, made honestly, but untrue in point of fact by reason of the defendant having omitted to include trade buildings in his compensation of capital, has been held to give no right of action (*Glasier v. Rolls*, 62 L. T. 133). Where the defendant sold a cannon to the plaintiff, having concealed a defect in it, and the plaintiff never inspected the cannon, which, owing to the defect, burst on being used, it was held that the defendant was not liable, as plaintiff never inspected the cannon and was not deceived by the attempted fraud (*Horsfall v. Thomas*, 1 H. & C. 90).

**Guarantee.**—A false representation may be such as to amount to, or to be in the nature of, a guarantee. By the fourth section of the Statute of Frauds, a promise to answer for the debt, default, or miscarriage of another must be in writing and signed. The object of this provision was, however, practically evaded by a number of cases, notably

*Paseley v. Freeman*, which were framed in tort instead of in contract.

In consequence of this Lord Tenterden's Act, 9 Geo. IV. c. 14, was passed, requiring every eulogy of another's conduct, credit, ability, &c, made with the object of inducing trust of such person, to be in writing and signed by the party to be charged therewith, before an action for false representation would lie. According to the better opinion, only statements really going to the assurance of personal credit are within the statute (*Lyde v. Barnard*, 1 M. & W. 101). But Lord Tenterden's Act is now superseded to a certain extent by rule of evidence laid down by the Judicature Act.

**Damages.**—Wherever a man wickedly asserts that which he knows to be false, and thereby draws his neighbour into a heavy loss is responsible for it or for so much of the loss as was the necessary, natural, or probable known consequences of the misrepresentation (*Paseley v. Freeman*, 2 Sm. L. C. 74; *Mullett v. Mason*, 35 L. J. C. P. 299). All who profit more or less by a fraud, and all who aid and abet it, as well as those who directly commit it, are all liable in damages.

Where the plaintiff had been induced by the fraud of the defendant to take up shares which were really worthless, he was held entitled to recover the full amount he had paid for them, although they had a market value at the time he took them (*Twycross v. Grant*, 2 C. P. D. 469).

**Indian cases.**—Where the plaintiff's property had been fraudulently transferred, it was held that he was entitled to recover the damage for loss, which he sustained on account of such fraudulent transfer from the actual transferrer, and from the person who was found to have been the prime mover and instigator in the transaction, as well as from his own agent who consented to such transfer, and the purchaser who, being aware of circumstances sufficient to create suspicion, dealt with persons who had no authority to sell (*Wharton v. Moona Lall*, 1 Agra 96). In a suit for loss resulting from untrue representation damages are arrived at by considering the difference in the position the plaintiff would have been in had the representation been true and the position he actually is in in consequence of its being untrue (*Sha Karamchand v. Shah Ghelabhai*, (1896) P. J. 335).



*Misrepresentations made by agents.*

MISREPRESENTATIONS MADE BY AGENTS.

The principal  
knows the  
representa-  
tion to be  
false.....

If he authorizes  
the making of  
it—principal  
liable.

If the representation is made by the agent in the general course of his employment, and .....

The agent *knows*  
it to be *false*—  
principal liable.

The agent *thinks*  
it to be *true* ...

When the principal *fraudulently* keeps the knowledge from the agent--principal liable .....

When the knowledge is held back by the principal through *inadvertence* — principal probably liable.

The principal  
thinks the  
representa-  
tion to be  
true .....

If he authorizes  
the making of  
it and .....

If the representation is made by the agent in the general course of his employment and .....

The agent *knows* at the time, or *finds out* afterwards that it is *false*—principal liable .....

The agent *thinks*  
it to be *true*—  
principal n o t  
liable .....

The agent *knows* it  
is *false*—princi-  
pal liable .....

The agent *thinks*  
it to be *true*—  
principal n o t  
liable .....

The fraud of the agent, acting within the scope of his employment, is the fraud of the principal. But the liability of the principal depends on several considerations :—

A. The principal **knows** the representation to be false.

(I) He *authorizes* the making of it. In this case, whether the agent knows it to be false or thinks it to be true, the principal is liable.

(II) The representation is made by the agent in the *general course of his employment*, but *without any specific authorization* from the principal. When

(1) The agent *knows* it to be false, the principal is liable (per Parke, B., in *Cornfoot v. Fowke*, 6 M. & W. 358).

(2) The agent *thinks* it to be *true*. In this case the contract may always be rescinded ; but will an action for fraud lie against the principal ? The two following distinctions must be remembered :—

(a) When the principal *fraudulently keeps the knowledge from the agent*, he is no doubt liable. This was admitted by all the Barons in *Cornfoot v. Fowke*, and followed in *Ludgator v. Love* (44 L. T. N. S. 694), where a father knowingly directed his son to make a false representation about the condition of some sheep.

(b) When the knowledge is held back by the principal through *inadvertence*. In this case it is probable that an action will lie against the principal, though this would be contrary to the decision in *Cornfoot v. Fowke*, where there was a mis-statement by the agent in good faith, and there was no suggestion of fraud on the part of the principal, about the condition of a house, and it was held that the plaintiff could not get out of his agreement on the ground of fraud. “ I think it is impossible to sustain a charge of fraud, when neither the principal nor agent has committed any : the principal, because, though he knew the fact, he

was not cognizant of the misrepresentation being made, nor even directed the agent to make it: and the agent, because, though he made a misrepresentation, yet he did not know it to be one at the time he made it, but gave his answer *bona fide*" (per Alderson, B.). Abinger, C. B., dissented, and it is very probable that this case will be overruled; if, indeed, it is even now law. Many dicta are to be found adverse to this decision, those of Willes, J., in *Barwick v. English Joint Stock Bank*, (L. R. 2 Ex. 259) being especially worthy of notice.

B. The principal **thinks** the representation to be true.

(I) He *authorizes* it to be made. When

(1) The agent *knows* at the time, or finds out afterwards, that it is *false*, the principal is liable (*Barwick v. Joint Stock Bank*).

(2) The agent thinks it to be *true*—here the principal is not liable.

(II) The agent makes the representation *in the general course of his employment*, but without any specific authorization. When

(1) The agent knows it is *false*, the principal is liable (*Udell v. Atherton*, 7 H. & N. 181). It has been suggested that this liability is limited to the amount of the profit made, though in *Swire v. Francis*, (3 App. Cas. 106), the Privy Council held a principal liable who derived no profit at all. It is, however, possible that the limitation suggested would be held applicable if the defendant were a corporation (per Lord Cranworth, in *Western Bank of England v. Addie*, L. R. 1 Sc. App. 166; and see per Bowen, L. J., in *British &c. Co. v. Charnwood*, 18 Q. B. D. 719); though the point was not taken in *Denton v. G. N. Ry.*, (5 E. & B. 860).

(2) The agent thinks it to be *true*—the principal is not liable.

Thus, we find that the principal is liable in all possible cases except when both he and his agent believe the latter's misrepresentation to be the truth (*Fraser*, 153).

**Principal liable.**—The plaintiff, having for sometime, on a guarantee of defendants, supplied D, a customer of theirs, with oats, on credit, for carrying out a Government contract, refused to continue to do so unless he had a better guarantee. The defendant's manager thereupon gave him a written guarantee, to the effect that the customer's cheque on the bank in plaintiff's favour, in payment of the oats supplied, should be paid on receipt of the Government money in priority to any other payment "except to this bank." D was then indebted to the bank to the amount of £12,000, but this fact was not known to the plaintiff, nor was it communicated to him by the manager. The plaintiff, thereupon, supplied the oats to the value of £1,227. The Government money, amounting to £2,676, was received by D and paid into the bank; but D's cheque for the price of the oats drawn on the bank in favour of the plaintiff was dishonoured by the defendants, who claimed to detain the whole sum of £2,676 in payment of D's debt to them. The plaintiff having brought an action for false representation: it was held, (1) that there was evidence to go to the jury that the manager knew and intended that the guarantee should be unavailing and fraudulently concealed from the plaintiff the fact which would make it so; and (2) that the defendants would be liable for such fraud (*Barwick v. English Joint Stock Bank*, L. R. 2 Ex. 259). An officer of a banking corporation whose duty it was to obtain the acceptance of bills of exchange in which the bank was interested, fraudulently, but without the knowledge of the president or directors of the bank, made a representation to A, which, by omitting a material fact, misled A, and induced him to accept a bill in which the bank was interested, and A was compelled to pay the bill, it was held that A could not recover from the bank the amount so paid. In an action of deceit, whether against a person or against a company, the fraud of the agent may be treated, for the purpose of pleading, as that of the principal (*Mackay v. Commercial Bank of Brunswick*, L. R. 5 P. C. 394). One of several partners in a patent induced the plaintiff, by false and fraudulent representations, to pay £3,000 for part of the profits to be obtained by its working, all the partners were held liable to repay the money, although there was no evidence of fraud on the part of more than one (*Lovell v. Hicks*, 2 Y. & C. 46). One of several solicitors connived at a fraud committed by a client of the firm in obtaining money out of the Court of Chancery. The money was received by the one partner under a power of attorney, and was handed over to the client. The other partners were entirely innocent, and were, in fact, ignorant of the transaction. It was held that they were jointly and severally liable to make good the money to those to

whom it really belonged (*Brydges v. Branfill*, 1 Mer. 575). Two persons were in partnership as solicitors. A client entrusted one of them with money to invest on mortgage, and was told by him that it was so invested; whereas, in truth, the partner who had received the money had misapplied it. For many years the client was regularly paid interest by the solicitor who attended to the matter, and the fraud was not discovered until he became a bankrupt. The other partner, who knew nothing whatever of the fraud, was nevertheless held liable to make good the money (*Blair v. Bromley*, 5 Ha. 542). In *Fountleroy forgery cases*, Fountleroy who was a partner in the banking house of Marsh & Co., forged powers of attorney for the sale of stock belonging to the customers of the bank. Marsh & Co., had an account with Martin, Stone & Co., and the broker who sold out the stock under the forged powers of attorney remitted the proceeds of the sale to the credit of Marsh & Co., with Martin, Stone & Co. Fauntleroy then drew out these monies by a cheque signed by him in the name of his firm, and applied them to his own use. The firm of Marsh & Co. was, however, held liable for them, although none of the partners except Fauntleroy had any hand in his forgeries or frauds, or in fact knew anything of what had taken place (*Stone v. Marsh, R. & M.* 364; *Keating v. Marsh*, 1 M. & A. 582; *Marsh v. Keating*, 2 C. & F. 250; *Ex parte Bolland*, M. & M. 315; *Hume v. Bolland*, 1 Cr. & M. 130). Where a coal-merchant conspired with the agent of a purchaser to charge the purchaser a higher price than he (the coal-merchant) was willing to sell at, the difference being paid to the agent by way of a bribe, it was held that an action for fraud lay against the coal-merchant (*Mayor v. Lever*, (1891) 1 Q. B. 168).

**Principal not liable.**—Where the secretary of the company by false statements induced persons to take shares, it was held that the company was not liable; for it is no part of the duty of a secretary of a company to make representations to persons to induce them to become shareholders (*Newlands v. N. E. A. A. Co.*, 54 L. J. Q. B. 428); here as the agent makes a fraudulent statement outside the general scope of his employment, the principal will not be liable. One of several solicitors was entrusted with money for the purpose of investing it on mortgage when a good opportunity offered, but he misapplied it. Held, that his co-partner was not liable, inasmuch as there was no evidence to show that it was part of the business either of the firm in question or of solicitors generally to act as scriveners, *i. e.*, as depositaries of money waiting for investment (*Hannan v. Johnson*, 2 E. & B. 61).

### *Misrepresentations by directors and companies.*

If directors of public companies authorize the publication and circulation of prospectuses and advertisements

concerning the affairs of the company, containing statements, with their signatures annexed thereto, which are false to the knowledge of the directors, and which the directors, from their position and means of knowledge, may fairly be taken to warrant as true, they will be responsible in damages to parties who have taken shares, and invested money in the company, on the faith of these prospectuses, and have sustained damage in consequence thereof (*Henderson v. Lacon*, L. R. 5 Eq. 249). When the company has adopted these representations there may be an action against the company also, but not against an individual shareholder who has not signed the report (*Newbrunswick & Co. v. Conybeary*, 8 Jur. N. S. 845; see *Lynde v. Anglo-Italian Hemp Spin. Co.*, 12 T. L. R. 61). Where the company is in the truth the principal, and the directors mere intermediate agents, then in the absence of personal fraud, individual directors are not liable for the fraudulent acts of agents (*Weir v. Barnett*, 3 Ex. D. 41, 238).

Mere trifling errors, or overpraise of the prospects of a company, will not amount to a deceptive statement (*Keish v. Venezuela Ry.*, 11 Jur. N. S. 646). In an advertisement some allowance must always be made for the sanguine expectations of the promoters of the adventure, and no prudent men will accept the prospectuses which are always held out by the originators of every new scheme, without considerable abatement (per Lord Chelmsford in *Directors of the V. R. Co. v. Kish*, L. R. 2 H. L. 99).

Where the object with which the prospectus of a company is issued is not merely to induce application for allotment of shares, but also to induce persons to whom it is sent to purchase shares in the market, its function is not exhausted when company has gone to allotment, and the person issuing the prospectus is responsible for the consequences of a false representation contained in it, and known to him at the time to be false, to any person to whom the prospectus has been sent, and who is induced by the false representation to purchase shares and thereby sustains a loss. In this case *Peek v. Gurney* was distinguished. Where a person who has issued the prospectus of a com-

pany containing a false representation known to him at the time to be false, subsequently causes to be published a false representation to the same effect as that of the prospectus with the direct intent of inducing persons to purchase shares in the company, he is responsible for the consequence of so doing to any one who having received a prospectus purchases shares on the faith of the false representation so published and thereby sustains a loss (*Andrew v. Macford*, (1896) 1 Q. B. 372).

**Damages.**—In actions against directors of a company for deceit in inducing the plaintiff to purchase shares, the proper mode of measuring damages is to ascertain the difference between the purchase money paid and what would have been a fair price to be paid for the shares, according to the true circumstances of the company at the time of the purchase (*Davidson v. Tulloch*, 6 Jur. N. S. 545). The question is what was the real value in fact; if the shares had any market value, or if the plaintiff had sold them, that must be allowed for; but if they had no real value, then the measure is the price paid for them, and no allowance is to be made for a mere delusive value on the stock-exchange due in fact to the fraud of the directors (*Twycross v. Grant*, 2 C. P. D. 489).

### *Misrepresentations by sellers.*

A seller is liable to an action for deceit if he fraudulently misrepresents the quality of the thing sold to be other than it is in some particulars which the buyer has not equal means with himself of knowing; or if he do so in such a manner as to induce the buyer to forbear from making the inquiries which for his own security and advantage he would otherwise have made (*Vernon v. Keys*, 12 East 637; *Parkinson v. Lee*, 2 East 320). There may be a custom in a trade for the seller to disclose particular defects at the time of sale, if he knows of them; and then he will be liable if he omits to do so (*Jones v. Bowden*, 4 Taunt. 847). And generally, if a seller knows of material

latent defects affecting the value of the goods, but offers them at the ordinary price, knowing that the buyer is grossly deluded by their appearance, he will be liable in damages for wilful deceit (*Hill v. Gray*, 1 Stark. 434). But patent defects, discoverable by ordinary inquiry need not be disclosed; but then no art or contrivance must be resorted to in order to conceal such defects (*Hill v. Balls*, 27 L. J. Ex. 45).

**Damages.**—When the deceit was in regard to a sale of chattels, the rules for assessing value in actions for breach of warranty may be consulted, it being always remembered that the presence of fraud justifies more readily a presumption as to value against a wrong-doer, than where there is liability, but without fraud; and any special damage, the legal and natural consequence of the fraud, may be added to the deficiency in the value of the chattels.

Where the defendant fraudulently sold to the plaintiff an infected cow as sound, and five other cows of the plaintiff became infected and died, the plaintiff recovered the value of all the cows (*Mullett v. Mason*, L. R. 1 C. P. 559; *Smith v. Green*, 1 C. P. D. 92).

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## CHAPTER XX.

### NUISANCE.

NUISANCE has been defined to be "anything done to the hurt or annoyance of the lands, tenements or hereditaments of another, and not amounting to a trespass" (*Stephen*, iii, 499). The word nuisance is derived from the French word *nuire*, to do hurt or to annoy. Blackstone describes nuisance (*nocumentum*) as something that "worketh hurt, inconvenience or damage." It is the wrong done to a man by unlawfully disturbing him in the enjoyment of his property or, in some cases, in the exercise of a common right (*Pollock*, 385).

Nuisances are of two kinds: (a) Public and (b) Private.

(a). **Public or common nuisance** is an offence against the public, either by doing a thing which tends to the annoyance of all the King's subjects, or by neglecting to do anything which the common good requires. It is an act affecting the public at large, or some considerable portion of them; and it must interfere with rights which members of the community might otherwise enjoy. Acts which seriously interfere with the health, safety, comfort or convenience of the public generally, or which tend to degrade public morals, have always been considered public nuisances. They are dealt with by, or in the name of, the Crown. Public nuisance can only be the subject of one indictment, otherwise a party might be ruined by a million suits. It depends in a great measure upon the number of houses and the concourse of people in the vicinity. An indictment will fail if the nuisance complained of only affects one or few individuals. Again no length of time can legalize a public nuisance, though it may supply a

defence to an action by a private person (*Weld v. Hornby*, 7 East 199; see s. 268 of the Indian Penal Code as to nuisance punishable as a crime).

Drawing water for a canal from a filthy and polluted source (*Att.-Gen. v. Bradford Canal*, L. R. 2 Eq. 71); carrying on trades which cause offensive smells (*Malton Board of Health v. Malton Manure Co.*, 4 Ex. D. 302), or intolerable noises (*Lambton v. Mellish*, (1894) 3 Ch. 163); keeping gunpowder, naphtha, or similar inflammable substances in such large quantities as to be dangerous to life and property (*R. v. Lister*, D. & B. 209) are instances of public nuisance. And so every act will be a nuisance which obstructs the public in the use of a highway or navigable river, either by actually blocking up or narrowing the available passage (*R. v. Lord Grosvenor*, 2 Stark. 511; *Smith v. Wilson*, (1903) 2 I. R. 45; *In re Nuresh Chandra*, 14 Cal. 656), or by causing such a noxious smell as to be a substantial annoyance to those using the highway, although not to the neighbourhood in general (*R. v. Pappenean*, 2 Str. 686; *R. v. Neil*, 2 C. & P. 485), or by placing anything on the land next to the highway, which can be a source of danger to persons properly using it (*Penna v. Clare*, (1895) 1 Q. B. 199); and so also is running horse races on Sunday on a race-course adjoining a residential locality (*Dewar v. City and Suburban Racecourse Co.* (1899) 1 I. R. 345).

Public nuisance does not create a civil cause of action for any person. In order that an individual may have a private right of action in respect of a public nuisance—

(1) he must show a particular injury to himself beyond that which is suffered by the rest of the public;

(2) such injury must be direct, and not a mere consequential injury; and

(3) it must be shown to be of a substantial character, not fleeting or evanescent (per Brett, J., in *Benjamin v. Storr*, L. R. 9. C. P. 406, 407; *Sadu v. Suka*, 5 Bom. L. R. 116).

Where the plaintiff resided in a house next to a Roman Catholic chapel of which the defendant was priest, and the chapel bell was rung at all hours day and night, as Soltan, speaking for himself and the neighbours generally, said plainly "the practice we complain of is offensive alike to our ears and feelings; disturbs the quiet and comfort of our houses; molests us in our enjoyments, whether of business, amusement, or devotion; and is peculiarly injurious and distressing when members of our household happen to be invalids; it tends also to depreciate the value of our dwelling houses," it was held that

ringing was a public nuisance and the plaintiff was held entitled to an injunction (*Soltau v. DeHeld*, 2 Sim. N. S. 311). Where the plaintiff declared that he was navigating his barges, laden with goods, along a public navigable creek, and that defendant wrongfully moored a barge across, and kept the same so moored, and thereby obstructed the public navigable creek, and prevented the plaintiff from navigating his barges so laden, *per quod*, plaintiff was obliged to convey his goods a great distance overland, and was put to trouble and expense in the carriage of his goods overland (*Rose v. Miles*, 4 M. & S. 101); where the plaintiff, by reason of the road being obstructed, was unable to cart his corn which adjoined the highway, and which was in consequence spoiled (*Maynell v. Saltmarsh*, 1 Keb. 847); where the plaintiff was driving his asses along a highway, and the defendant shut a gate and forced him, while thus actually using it, to take a more circuitous way (*Greasley v. Codling*, 2 Bing. 263; *Caledonian Ry. v. Ogilvie*, 2 Mac. 235); where the operations of a railway company obstructed the entrance to some mews, in which the plaintiff carried on his business of coach master (*Spenser v. London & B. Ry.*, 3 Sm. 193); where horses and waggons were kept standing for an unreasonable time in the highway opposite a man's house, so that the access of customers was obstructed, the house was darkened, and the people in it were annoyed by bad smells (*Benjamin v. Storr*, L. R. 9 C. P. 400); and where the obstruction of a highway prevented customers from coming to a colliery (*Iveson v. Moore*, 1 Ld. Raym. 486) it was held in all these cases that an action lay as "particular, direct and substantial" damage was caused to plaintiffs.

The diversion of traffic or custom from a man's door by an obstruction of a highway, whereby his business is interrupted, and his profits diminished, seems to be too remote a damage to give him a right of private action (*Reckett v. Metro. Ry.*, L. R. 2 H. L. 188), unless indeed the obstruction is such as materially to impede the immediate access to the plaintiff's place of business more than any other men's, and amounts to something like blocking up his doorway (*Fritz v. Hobson*, 14 Ch. D. 542; *Wilkes v. Hungerford Market Co.*, 2 Bing. N. C. 281).

*Indian case.*—The plaintiffs became owners of Grant Buildings situated at Colaba in Bombay in 1868, and had ever since derived a considerable income from the rooms by letting them to Europeans at an average rent of Rs. 50 a month. The defendants were owners of an adjacent cotton mill known as the Nichol Mill, which was erected in 1873. Prior to 1873 the site of the mill was occupied by the buildings of the Hydraulic Press Company, which were erected in 1868. The premises were in 1873 purchased by the Nichol Press and Manufacturing Company who thereupon proceeded to build the Nichol Mill. In an action, the plaintiff obtained compensation against the defendants on account of certain rooms in the building which remained unlet owing to the noise and smoke of the mill, and an injunction

was obtained prohibiting any increase of smoke, cotton-fluff or noise of machinery beyond what subsisted at the time of the decree (*The Land Mortgage Bank of India v. Ahmedbhoy*, 8 Bom. 35).

*Leading cases.*—*Soltan v. DeHeld*; *Rose v. Miles*.

(b). **Private nuisance** is an act affecting some particular individual or individuals as distinguished from the public at large. It cannot be made the subject of an indictment, but may be the ground of civil action for damages or an injunction or both. It includes all kinds of damage arising from water (other than certain classes of mine water), filth, fire, gases, or other noxious things being caused or permitted to pass from the defendant's land on to the plaintiff's, all damage arising from improper use of a natural stream, damage arising from the excavation of the defendant's land, and the consequent withdrawal of the support to which the plaintiff's land is entitled, obstructions of easements of all kinds, and injuries to rights of profit *à prendre* (*C. & L.*, 329).

A right to commit a private nuisance may be acquired by prescription as an easement (*Murgatroyd v. Robinson*, 7 E. & B. 391; *Leconfield v. Lonsdale*, L. R. 5 C. P. 657; *Sturges v. Bridgman*, 11 Ch. D. 852). But if the nuisance injuriously affects the public, no prescription will make it lawful (*DeWill v. Saunders*, Cro. Jac. 490; *R. v. Cross*, 3 Camp. 224).

A man may become responsible for a nuisance by erecting a building which overhangs the house or land of his neighbour, or by constructing a cornice, or fixing a spout, or any projection which causes, or has a tendency to cause, an unnatural quantity of rain water to descend on his neighbour's house and land (*Penrudlock's case*, 5 Co. 205; *Reynolds v. Clark*, Fort. 212); or by erecting and working a noisy smith's forge, or noisy workshops (*Bradley v. Gill*, Lutw. 69), or a stinking tallow-furnace, smelting-house, dye-house, lime-kiln, tan-pit, privy, or hog-sty (*Poynton v. Gill*, Cro. Car. 510; *Jones v. Powell*, Hutt. 135; *Bliss v. Hall*, 5 Sc. 504; *Aldred's case*, 9 9 Rep. 576; *Hodgkinson v. Ennor*, 4 B. & S. 229); or by making a cess-pool, the filth of which percolates through the soil and contaminates the

water of his neighbour's well or spring (*Norton v. Scholefield*, 9 M. & W. 665); or by burning lime or bricks, or erecting a glass-house or brew-house so near to a dwelling-house that the smoke and smell thereof enter the house and render it unfit for habitation (*Walter v. Selfe*, 20 L. J. Ch. 443; *Jones v. Powell*, Palm. 539); or by disturbing a decoy-pond by the firing of guns in the neighbourhood of the pond (*Keble v. Hickeringill*, 11 Mod. 74; *Carrington v. Taylor*, East 571; *Ibbotson v. Peat*, 3 H. & C. 644); or by playing a steam-organ (*Spruzen v. Lossett*, 12 T. L. R. 246).

While the plaintiff's carter was leading two horses drawing a cart along a highway up an incline, one of the horses slipped and fell against a spiked iron fence belonging to the defendants, and received injuries in consequence of which it died. The fence had been put up for about seven years; before it was put up there were a bank and hedge at the side of the road. The Court said the law no doubt was that if a person erected on his own land anything calculated to interfere with the use of a highway, what he so did was a nuisance. But that the erection of the wire fence, not with spikes jutting out into the road, but with perpendicular spikes, did not amount to a nuisance (*Gibson v. Plumstead Burial Board*, 13 T. L. R. 273). A tramway company after a heavy snowstorm cleaned their track by means of a snow plough, and thereby increased the deposit of snow in certain portions of the street, and, in order to prevent the snow or snow-water from freezing in the grooves, they scattered salt upon the rails and in their vicinity. The snow and salt in combination formed a wet briny amalgam, and the slush thus formed was left to remain in the street without being removed then and there. The result was that the briny slush permeated a large portion of the street and caused a good deal of injury to horses standing or moving there. Held, that these acts of the tramway company amounted to an unauthorized nuisance, and that they were responsible for it, notwithstanding the fact that the duty of removing any obstructions in the street rested with the Town Council as the street authority (*Ogston v. Aberdeen District Tramways Co.*, (1897) A. C. 111).

It is a very desirable thing to mark the difference between an action brought for a nuisance upon the ground that the alleged nuisance produces material injury to property, and an action brought for a nuisance on the ground that the thing alleged to be a nuisance is productive of sensible personal discomfort. With regard to the latter, namely, the personal inconvenience and interference with one's enjoyment, one's quiet, one's personal freedom, any thing that discomposes or injuriously affects the senses or

the nerves, whether that may or may not be denominated a nuisance, must undoubtedly depend greatly on the circumstances of the place where the thing complained of actually occurs. If a man lives in a town, it is necessary that he should subject himself to the consequences of those operations of trade which may be carried on in his immediate locality, which are actually necessary for trade and commerce, and also for the enjoyment of property, and for the benefit of the inhabitants of the town and of the public at large. If a man lives in a street where there are numerous shops, and a shop is opened next door to him, which is carried on in a fair and reasonable way, he has no ground for complaint because to himself individually there may arise much discomfort from the trade carried on in that shop. But when an occupation is carried on by one person in the neighbourhood of another, and the result of that trade or occupation or business is a *material injury to property*, then there unquestionably arises a very different consideration. In a case of that description, the submission which is required from persons living in society to that amount of discomfort which may be necessary for the legitimate and free exercise of the trade of their neighbours, would not apply to circumstances the immediate result of which is *sensible injury to the value of the property* (per Lord Westbury, L. C., in *St. Helen's Smelting Co v. Tipping*, 11 H. L. 642).

It appears that the degree of harm, in an action for **personal discomfort** must be *greater* than in an action for **injury to property**. As to the degree of discomfort which constitutes a nuisance, Knight-Bruce, V. C., said in *Walter v. Selfe* (4 De G. & S. 315): "Both on principle and authority the important point for decision may be thus put: Ought this inconvenience to be considered in fact as more than fanciful, more than one of mere delicacy or fastidious-

ness, as an inconvenience materially interfering with the ordinary comfort, physically, of human existence, not according to the elegant or dainty modes and habits of living, but according to plain and sober and simple notions among the English people?" In considering this question regard must be had to the character of the locality, and the class of persons of whom the public is composed. "Whether anything is a nuisance or not is a question to be determined, not merely by an abstract consideration of the thing itself, but in reference to its circumstances. What would be a nuisance in Belgravia would not necessarily be a nuisance in Bermondsey" (*Sturges v. Bridgman*, 11 Ch. D. 865).

*Injury to property.*

Any nuisance whereby *sensible injury* is caused to the property of another is actionable.

**Trade.**—A man may, without being liable to an action, exercise a lawful trade, as that of a butcher, brewer, or the like, notwithstanding it is carried on so near the house of another as to be an annoyance to him, in rendering his residence less delectable or agreeable; provided the trade is so conducted that it does not cause what amounts in point of law to a nuisance to the neighbouring house. But if a nuisance is created, it is no answer to an action for damages to show that the place where the trade is carried on is a fit and convenient place for such a trade, and that in the exercise of the trade there is only a reasonable use by the defendant of his own land. The spot may be very convenient for the defendant or for the public at large, but very inconvenient to a particular individual, who chances to occupy the adjoining land; and proof of the benefit to the public from the exercise of a particular trade in a particular locality can be no ground for depriving any individual of his right to compensation in respect of the particular injury

he has sustained from it (*Bamford v. Turnley*, 3 B. & S. 62.—*Addison*). Again, a man cannot by first starting a noxious trade on a barren spot, compel the owners of adjoining land to leave it waste, where but for the nuisance they could build upon it or otherwise use it; and though in a crowded city less quiet and cleanness must be expected than in the country, no one can require others to submit to more than the natural and incidental annoyances of the locality; and the place for a noxious trade must be convenient and proper, not in regard to the trader who uses it, but to those who are affected by its being so used (*Sturges v. Bridgman*, 11 Ch. D. 365). The word 'convenient' means a place where a nuisance will not be caused to another. "A tan-house is necessary, for all men wear shoes; and nevertheless it may be pulled down if it be erected to the nuisance of another. In like manner of a glass-house; and they ought to be erected in places convenient for them" (*Jones v. Powell*, Palm. 539).

"It was not every degree of annoyance, however small, that would be actionable. The doctrine being that the law does not regard trifling inconveniences; that everything must be looked at from reasonable point of view, the injury from noxious vapour must such as to visibly (sensibly?) diminish the value of the property and the comfort and enjoyment of it; that in determining that question, the time, locality and all the circumstances should be taken into consideration; and that in districts where great works have been erected and carried on, which are the means of developing the national wealth, persons must not stand on extreme rights and bring actions in respect of every matter of annoyance, for that would be destructive to business in these places" (per Mellor, J., in *St. Helen's Smelting Co. v. Tipping*). The damage must be sensible, so that every fairly instructed person can really and clearly



perceive it, not merely such as can only be made sensible by the microscope or by chemical tests (*Salmon v. North & C's Coal. Co.*, L. R. 9 Ch. 705).

A bought an estate in a neighbourhood where many manufacturing works were carried on. Among others, there were works of a copper-smelting company. It was not proved whether these works were in actual operation when the estate was bought. The vapours from these works, when they were in operation, were proved to be injurious to the trees on A's estate. Held, that A was entitled to damages (*St. Helen's Smelting Co. v. Tipping*, *sup.*).

*Leading case.*—**St. Helen's Smelting Co. v. Tipping.**

**Sewers, drains, &c.**—Every occupier of land is entitled to the reasonable enjoyment thereof as a natural right of property, and may maintain an action against any one who allows any filth or other noxious thing produced by him on his own land to interfere with this enjoyment, or who, by artificial means, causes things in themselves in-offensive to pass into his neighbour's property to the prejudice of his enjoyment thereof (*Hurdman v. N. E. Ry.*, 3 C. P. D. 168). Thus, every occupier is bound to prevent the filth from his drains or cesspools from filtering through the ground into his neighbour's house or land. If by reason of an originally faulty construction of the sewer, the filth therefrom percolates through the soil and floods the cellars of the adjoining occupiers the landowner will be responsible for the nuisance, although such occupiers are his own tenants (*Tenant v. Golding*, 1 Salk. 21).

When the plaintiff and defendant were occupiers of adjoining houses and an old drain commenced on the defendant's premises and then passed under other houses, receiving their drainage, and back again under the defendant's house and then under the plaintiff's, and did damage by leakage into his cellar, it was held that the defendant was liable for the damage done, although he he was unaware of the existence of the drain and was guilty of no negligence for it was his duty to keep his drainage from passing to the plaintiff's premises otherwise than along its accustomed channel (*Humphries v. Cousins*, 2 C. P. D. 239).

*Physical discomfort.*

There are two ingredients essential to constitute a cause of action in respect of nuisances of this class.

(1). The act complained of must be an act which, having special regard to the *circumstances* and *surroundings* of the defendant's property, is in *excess of the natural and ordinary course of enjoyment of that property*.

There are many acts, which are involved in the comfort of a man's dwelling, which must, in fact, in a greater or less degree, constitute a nuisance to a neighbour, who yet has no legal redress, and the true principle is that each person is entitled to the reasonable user of his dwelling-house, and is justified in doing any acts necessarily incidental to such user, though in deciding what constitutes a reasonable user all the surrounding circumstances must be considered as the only standard of what constitutes such a user; and, the acts of user must be done conveniently and not oppressively (per Bramwell, B., in *Bamford v. Turnley*, 31 L. J. Q. B. 286).

The defendant kept an hotel adjoining the plaintiff's residence, and put a kitchen stove in a place where no stove had previously been, and so near the wine-cellar of the plaintiff as to damage the wine. It was admitted that the stove was one of an ordinary character, well constructed, and that precaution had been taken to prevent its being obnoxious, but an injunction was granted (*Reinhart v. Mentasi*, 42 Ch. D. 685). This decision may be supported on the assumption of a finding that the placing for the first-time of a large stone against a neighbour's cellar, when it might be placed elsewhere, is not a reasonable user conveniently exercised.

(2). The act must materially interfere with the ordinary comfort of human existence. This second ingredient finds expression in the maxim *lex non favit votis delictorum*. It is not necessary that the acts or state of things complained of should be noxious in the sense of being injurious to health.

The interference with a man's comfort which will justify

the intervention of the Courts must be a *material interference with an ordinary and reasonable standard of comfort*, and must be considered in the light of the *circumstances of time and place*.

Nuisances of this class for the most part arise in respect of—

(1) Obstruction of light. (2) Pollution of air or water. (3) Noise.

1. **Light.**—With regard to this, see Wrongs to Easements, Chapter XVI, p. 350.

2. **Air.**—If by the use of coals or impure ashes and animal substances, smoke, vapour, and noisome gases are communicated to the air which surrounds and enters the plaintiff's house, so as to cause inconvenience to the occupiers thereof, and renders the house manifestly less comfortable, the act will be a nuisance, though the pollution of the air may not be carried to the extent of rendering it noxious to animal or vegetable health. Untainted and unpolluted air means not necessarily air as fresh, free and pure as at the time of building the plaintiff's house the atmosphere there was, but air not rendered to an important degree less compatible, or at least not rendered incompatible, with the physical comfort of human existence (*Walter v. Selfe*; *St. Helen's Smelting Co. v. Tipping*).

In India voluntarily vitiating the atmosphere so as to make it noxious to the public health is indictable as an offence (see I. P. C. s. 278).

An action was held to lie for a nuisance caused by the carrying on of the business of a tallow-chandler in a house adjoining the plaintiff's (*Bliss v. Hall*, 4 Bing. N. C. 183). An injunction was granted to prevent a gas company from manufacturing gas in such close proximity to the premises of the plaintiff, a market gardener, and in such a manner as to injure his garden produce by the escape of noxious matter (*Broadbent v. Imperial Gas Co.*, 7 De G. M. & G. 436). An injunction was granted to prevent a man burning bricks on his own land in such a proximity to that of the plaintiff, his neighbour, as to be offensive to him (*Walter v. Selfe*, 42 De G. & S. 315). An injunction was granted to

restrain the defendant from making bricks on a large scale on land within a short distance from the plaintiff's house (*Beardmore v. Treadwell*, 3 Giff. 688). An interdict was granted to prevent a company from carrying on calcining operations in any manner whereby noxious vapours would be discharged on the pursuer's land, so as to do damage to his plantations or estate (*Sholts v. Inglis*, 7 App. Cas. 518). The defendant was the occupier of premises underneath a residential flat, and he turned the premises into a restaurant and thereby caused a nuisance by heat and smell to the occupier of the flat above. Held, that the alterations made by the defendant were not reasonable as regards his user of the premises, and he was liable for the nuisance (*Sanders Clark v. Grosvenor Mansions Co.*, 16 T. L. R. 428).

**Water.**—As regards nuisance from pollution of water, see Infringements of Rights of Water, Chapter XVI, p. 338.

Pollution of a public spring or reservoir, so as to render it less fit for the purpose for which it is ordinarily used, is a public nuisance, and is punishable as an offence (see I. P. C. s. 277).

3. **Noise.**—Quietness and freedom from noise are indispensable to the full and free enjoyment of a dwelling-house. "A nuisance by noise, supposing malice to be out of question, is emphatically a question of degree. If my neighbour builds a house against a party-wall next to my own, and I hear through the wall, more than is agreeable to me, the sounds from his nursery or music room, it does not follow, even if I am nervously sensitive or in infirm health, that I can bring an action or obtain an injunction. Such things, to offend against the law, must be done in a manner which, beyond fair controversy, ought to be regarded as exceptive and unreasonable" (per Lord Selborne in *Gaunt v. Finney*, 8 Ch. App. 8; *Crumph v. Lambert*, L. R. 3 Eq. 409).

In making out a case of nuisance of this character, there are always two things to be considered, the right of the plaintiff and the right of the defendant. If the houses adjoining each other are so built that from the commencement of their existence it is manifest that each adjoining inhabitant

was intended to enjoy his own property for the ordinary purposes for which it and all the different parts of it were constructed, then so long as the houses are so used there is nothing that can be regarded in law as a nuisance which the other party has a right to prevent. But, on the other hand, if either party turns his house or any portion of it, to unusual purposes in such a manner as to produce a substantial injury to his neighbour, it appears to me that that is not according to principle or authority a reasonable use of his own property; and his neighbour showing substantial injury, is entitled to protection (*Ball v. Ray*, L. R. 8 Ch. D. 469).

If the trade is proved to be a noisome trade the defendant may, nevertheless, establish a **prescriptive right** to the exercise of the trade on the particular spot, by showing that he has exercised it without molestation or interruption for the period of twenty years. The right to carry on a noisome trade in derogation of the rights of another may also be gained by statute, custom, or grant; but the right to carry on a trade which creates a public nuisance can only be acquired by clear statutory authority (*Elliotson v. Feetham*, 2 Bing. N. C. 143; *Flight v. Thomas*, 10 A. & E. 590). But time will not always supply such a defence, where the nuisance is one that has been gradually increasing (*Goldsmid v. Tunbridge*, L. R. 1 Eq. 161).

**Noise.**—The constant daily ringing of a peal of heavy bells in a house actually adjoining a private residence was held to be an actionable nuisance and an injunction was granted to restrain it (*Soltau v. DeHeld*, 2 Sim. N. S. 133; *R. v. Smith*, 2 Str. 703). Similarly, building operations were prevented from being proceeded with during the night to the annoyance and discomfort of an adjoining occupier (*Webb v. Barker*, W. N. p. 158). Sending up of fire-works and causing a band to play for several hours twice a week within one hundred yards of a dwelling house, was held to be an actionable nuisance (*Walker v. Brewster*, L. R. 5 Eq. 25). A circus, erected near the plaintiff's house, the performances of which lasted three hours every evening, making a loud noise heard through the plaintiff's house, was held to be a nuisance in

respect of which the plaintiff was entitled to an injunction (*Inchbald v. Robinson*, L. R. 4 Ch. 388). Similarly, an injunction was granted where a club was established for pugilistic encounters, which caused the collection of large and noisy crowds outside the club, which was kept open till 3 o'clock A. M. (*Bellamy v. Wells*, 60 L. J. Ch. 156). Injunctions were granted in respect of a nuisance consisting of a rifle-gallery, organ, and round-about in proximity to the plaintiff's house (*Winter v. Baker*, 3 T. L. R. 569), and in respect of noise connected with the carrying on of dairy business (*Fanshawe v. London & P. Dairy Co.*, 4 T. L. R. 694; *Tinker v. Aylesbury Dairy Co.*, 5 T. L. R. 52). A stable placed in such a close proximity to a house as to interfere by reason of the noise of the horses with the enjoyment of the owner of the house, will be restrained by an injunction as a nuisance at the suit of the latter (*Ball v. Ray*, L. R. 8 Ch. 467; *Broder v. Saillard*, L. R. 2 Ch. 692).

**Music.**—Where a nuisance was caused to a tenant of a room in a house by reason of the floor above being used for dancing and other entertainments, causing noise and vibration, the Court gave nominal damages but declined to grant an injunction on the ground of the balance of convenience (*Jenkins v. Jackson*, 40 Ch. D. 71). Giving of numerous music lessons by the defendant in a house separated from the plaintiff's house by a thin party wall, varied by practising and singing, and evening musical entertainments, was held not to be a nuisance for which an injunction would be granted; and moreover, the Court restrained the plaintiff from making noises by way of reprisal (*Christie v. Davey*, (1893) 1 Q. B. 316). The plaintiffs were auctioneers and public-house brokers and valuers, and the defendants were musical instrument makers and dealers and music sellers, at the adjoining house. The plaintiffs sued for an injunction to restrain the defendants from playing on pianos and other instruments, singing and shouting, or making other loud noises, in such a manner as to cause annoyance or injury to the plaintiffs in their business of auctioneers and valuers carried on by them, or otherwise using the defendant's said premises as an annoyance and injury to the plaintiffs. It appeared that the defendants were in the habit of letting their upper rooms for lessons in piano-forte playing and singing; but the plaintiff's complaint was directed mainly to the singing lessons. The Court limited the injunction to the singing only and restrained the defendants from allowing singing lessons to be given or singing practice to go on in the said premises to the annoyance of or injury to the plaintiffs in their business (*Motion v. Mills*, 13 T. L. R. 427).

**Prescription.**—A confectioner had for upwards of twenty years used, for the purposes of his business, a pestle and mortar in his back premises, which abutted on the garden of a physician, and the noise and vibration were not felt to be a nuisance or complained of until 1873, when the physician erected a consulting room at the end of his garden, and then the noise and vibration, owing to the increased proximity became a nuisance to him. The question for the

consideration of the Court was whether the confectioner had obtained a prescriptive right to make the noise in question. The Court of Appeal, affirming the judgment of Jessel, M. R., held that he had not, inasmuch as (1) the user was not physically capable of prevention by the owner of the servient tenement, and (2) was not actionable until the date when it became by reason of the increased proximity a nuisance in law, and under these conditions, as the latter had no power of prevention, there was no prescription by the consent or acquiescence of the owner of the servient tenement, which lies at the root of prescription (*Sturges v. Bridgman*, 11 Ch. D. 865).

### *Who may sue for a nuisance.*

If the injured property is in the occupation of tenants, the landlord or reversioner has no right of action, unless the nuisance is of a *permanent* character, and necessarily inflicts a *lasting damage* to the inheritance (*Mumford v. Oxford &c. Ry.*, 1 H. & N. 35), *e. g.*, permanent depreciation of the property, or by setting up an adverse claim of right and not of a temporary character, such as noise and smoke (*Mott v. Shoolbred*, 20 Eq. 22). A lessee who has underlet cannot sue alone in respect of a temporary nuisance, though he may properly sue as co-plaintiff with the actual occupier (*Jones v. Chappel*, 20 Eq. 539). However great a nuisance may be suffered by the occupiers of a house, it would seem that unless they go away and leave the house vacant, there is no injury to the reversion for which the landlord can sue. So long as the tenants stop and endure the nuisance they are the only persons who can complain (*Cooper v. Crabtree*, 20 Ch. D. 589).

The plaintiff was owner in fee of a cottage. The defendant, who owned land immediately adjoining, erected poles and a boarding thereon, in order to block out the access of light to the plaintiff's cottage. This boarding created an intolerable creaking noise, and was a nuisance to the occupiers of the cottage; but it was held that the landlord of the cottage was not entitled to an injunction against the maintenance of the boarding (*Cooper v. Crabtree*, 20 Ch. D. 589).

### *Who is liable for a nuisance.*

Every person who does, or directs the doing of, an act

which cannot be done at all without constituting a nuisance, is personally responsible, whether he was acting for himself, or for, or on behalf of, or for the benefit of another ; and whether he is a principal and employer, or a mere servant carrying into effect the orders of his master (*Wilson v. Peto*, 6 Moor. 49). He who actually creates a nuisance, whether on his own land or not, is liable for it (*Thomson v. Gibson*, 7 M. & W. 456).

In dealing with the question of the parties who are liable for a nuisance existing upon private property a distinction is to be drawn in the *first* place between those cases in which the damage is caused by the physical condition of the premises themselves and those in which the damage is caused by the particular mode of their user ; and, *secondly*, with regard to the former class of cases a further distinction is to be drawn between those cases in which the physical condition complained of is the result of a wrongful act of commission and those in which it is due to a wrong of omission.

1. Nuisance caused by physical condition of premises resulting from **act of commission**.

Where a nuisance complained of is caused by the physical condition of the premises and that condition is the result of an act of commission, as for instance, where a building is erected so as to obstruct the plaintiff's ancient lights (*Rosewell v. Prior*, 12 Mod. 635), or market (*Thompson v. Gibson*, 7 M. & W. 456) ; the party who originally created the nuisance remains liable for all the damage flowing from its continuance eventhough by reason of his not being in possession of the premises he is unable to prevent that continuance. "If a wrongdoer conveys his wrong over to another whereby he puts it out of power to redress it, he ought to answer for it" (*Rosewell v. Prior*, *sup.*).

2. Nuisance caused by physical condition of premises resulting from **wrong of omission**.



Where the physical condition of the premises complained of is the result of a wrong of omission, as where the owner of a house suffers it while in his possession to get into a ruinous state so that portions of it are likely to fall upon the adjoining land and do damage (*Todd v. Flight*, 9 C. B. N. S. 377; *Chaunter v. Robinson*, 4 Ex. D. 163), or where the owner of a coal plate (*Pretty v. Brickmore*, L. R. 8 C. P. 401) or grating (*Gwinnel v. Eamer*, L. R. 10 C. P. 658) in the footway of a public street permits it while in his possession to be in such an insecure condition as to be dangerous to persons using the street, such owner cannot get rid himself of the liability for the possible consequences of his breach of duty by merely letting the premises to tenants without taking a covenant from the tenant to repair them. If he lets them without such a covenant, both landlord and tenant are liable for any damage arising from the condition of disrepair existing at the date of the lease.

### 3. Nuisance caused by mode of user of premises.

Where the nuisance arises, not from the physical condition of the premises themselves, but from the mode of their user, then if the premises are, at the time of the nuisance arising, in the occupation of a tenant, the better opinion seems to be that the tenant is liable and the landlord is not, even though the latter may have contemplated the premises being used in the very way which brings about the state of things complained of (*C. & L.*, 361).

**Liability of landlords.**—As regards the liability of landlords to third persons, it may be taken as a general rule that the tenant, and not the landlord, is liable to third persons for any accident or injury occasioned to them by the premises being in a dangerous condition, and the only exceptions to this rule appear to arise when the landlord has either—

#### 1. Contracted with the tenant to repair; or

2. When he has let the premises in a ruinous condition (*Nelson v. Liverpool Brewery Co.*, L. R. 2 C. P. 311); or

3. When he has expressly licensed the tenant to do acts amounting to a nuisance (*White v. Jamieson*, L. R. 18 Eq. 303—*Woodfall*).

These rules, however, only apply to the property *actually let*; and where the landlord *retains control* of the approaches (*e. g.*, a stair-case common to a lot of flats) he, and not the tenant, is responsible both to tenants and strangers for injuries caused by want of repair (*Miller v. Hannock*, (1893) 2 Q. B. 177).

When both landlord and tenant are responsible for the injury, the plaintiff may proceed against either at his election. But he can have only one satisfaction for the same wrong; and having sued and recovered judgment against one, he cannot recover against the other (*Rosewell v. Prior*, 2 Salk. 460; *Brent v. Haddon*, Cro. Jac. 555).

If a landlord erects privies in such a situation that the use of them must necessarily create a nuisance and the privies are demised to tenants who use them and create a nuisance, the landlord will be responsible for the erection and continuance of the nuisance (*R. v. Pedley*, 1 Ad. & E. 822). So also, where the thing demised consisted of a dam or mound of earth, stopping up the channel of a river or water course, or keeping a mill-pond at an undue elevation (*Leslie v. Pounds*, 4 Taunt. 649; *Bishops v. Trustee of Bedford &c.*, 1 E. & E. 697). Where the land owner erected a coffee-shop with a low chimney under the plaintiff's windows, and let the coffee-shop to a tenant who lighted a fire in the chimney and created a great smoke, which penetrated the plaintiff's dwelling house and caused a nuisance, it was held that the landlord was not responsible for this nuisance, as the tenant could have burned coal or charcoal in the chimney and have used the chimney without necessarily creating a great smoke, or might have abstained from making fires at all when the wind was in such a direction as to carry the smoke to the plaintiff's house (*Rich v. Basterfield*, 4 C. B. 805).

**Unsafe premises.**—Where the declaration contained an allegation that the defendant let the house when the chimneys were known by him to be ruinous and in danger of falling, that he kept and maintained in that state, and that the tenant was under an obligation to repair, it was held that the landlord was

liable (*Todd v. Flight*, 30 L. J. C. P. 21). Where in consequence of disrepair, a chimney fell and injured the tenant's family, it was held that he had no remedy, unless the landlord had contracted to keep the house in repair, or unless there had been fraud on his part in industriously concealing the defect from the tenant (*Gott v. Gandy*, 23 L. J. Q. B. 1). The defendant let premises to a tenant who covenanted to keep them in repair. Attached to the house was a coal-cellar under the footway, with an aperture covered by an iron plate, which was, at the time of the demise, out of repair and dangerous, and a passer-by, in consequence, fell into the aperture, and was injured; it was held that the obligation to repair, being, by the lease, cast upon the tenant, the landlord was not liable for this accident (*Gwinnell v. Eamer*, L. R. 10 C. P. 658). A landlord who lets an unfinished house in a dangerous condition, he being under no liability to keep it in repair, is not liable to his tenant, or to a person using the premises for personal injuries caused through a defective staircase (*Lane v. Cox*, (1897) 1 Q. B. 415).

*Leading case.*—**Todd v. Flight.**

**Liability of purchaser.**—If a nuisance is created on premises, and a man purchases the premises with the nuisance upon them, though there is a demise for a term at the time of the purchase, so that the purchaser has no opportunity of removing the nuisance, yet by purchasing the reversion of the existing nuisance, he makes himself liable for the continuance of the nuisance. But if, after the reversion is purchased, the nuisance is erected by the occupier, the reversioner incurs no liability; yet, in such a case, if there were only a tenancy from year to year, or any short period, and the landlord chose to renew the tenancy after the tenant had erected the nuisance, and he knew of it, that would make the landlord liable; he is not to let the land with the nuisance upon it (*R. v. Pedley*, 1 Ad. & E. 82—*Addison*).

The purchaser of land with an existing nuisance upon it cannot be sued for continuing the nuisance until after a request made to abate it (*Penruddock's case*, 5 Rep. 101).

### *Remedies.*

The remedies for nuisances are (1) Abatement; (2) Damages; and (3) Injunction.

1. **Abatement**, *i. e.*, removal of the nuisance by the party injured. The removal must be (1) peaceable; (2) without danger to life or limb; and (3) if it is necessary to enter another's land to abate the nuisance, or where the nuisance is a dwelling-house in actual occupation on a common, after notice to remove the same, unless it is unsafe to wait. No more damage may be done than is necessary. It is lawful to remove a gate or barrier which obstructs a right of way, but not to break or deface it beyond what is necessary for the purpose of removing it. Where a structure, for instance a dam or weir across a stream, is in part lawful and in part unlawful, a party abating that which is unlawful cannot justify interference with the rest. He must distinguish them at his peril (*Greenslade v. Halliday*, 6 Bing. 379).

A private individual, however, cannot abate a public nuisance; he may have an action for damages, if he suffers a special and distinct damage from such public nuisance.

It is decided that not only walls, fences, and such like encroachments which obstruct rights of common may be removed, but a house wrongfully built on a common may be pulled down by a commoner if it is not removed after notice within a reasonable time (*Perry v. Fitzhove*, 8 Q. B. D. 757; *Davies v. Williams*, 16 Q. B. D. 546). If a tree overhangs the land of another person then that person can lawfully cut the overhanging branches even without giving notice, however long they have overhung his land (*Norris v. Baker*, 1 Roll. 393; *Lemon v. Webb*, (1895) A. C. 1).

*Indian cases.*—Plaintiff sued for an injunction restraining the defendant from allowing the branches of a tree belonging to him to overhang plaintiff's land, and for an order directing him to cut off some branches. Defendant pleaded that the branches of his tree had projected over plaintiff's land for forty years, and he contended that he had, therefore, acquired a prescriptive right of the nature of an easement over plaintiff's land. Held, that the plaintiff was entitled to cut away the branches which overhang his land, though they had done so for more than forty years (*Hari v. Shankar*, 19 Bom., 420). Certain plaintiffs sued for an injunction restraining defendants from obstructing them in cutting certain branches of a pipal tree overhanging their property. The pipal tree grew in the enclosure of a temple, and the resistance was based on the ground that the tree was an object of veneration to Hindus, and that the

lopping of its branches would be offensive to the religious feelings of the Hindu community. Held, that plaintiffs were entitled to the injunction prayed for and that the fact that the plaintiffs' action might cause annoyance to a large number of Hindus was not a sufficient ground for cutting down the well recognized common law rights of an owner of property (*Behari Lal v. Ghisa Lal*, 24 All. 496).

*Notice.*—"Nuisances by an act of commission are committed in defiance of those whom such nuisances injure and the injured party may abate them without notice to the person who committed them; but there is no decided case which sanctions the abatement by an individual of nuisances from omission, except that of cutting the branches of trees which overhang the public road or the private property of the person who cuts them...The security of lives and property may sometimes require so speedy a remedy as not to allow time to call on the person on whose property the mischief has arisen to remedy it. In such cases an individual would be justified in abating a nuisance from omission without notice. In all other cases of such nuisances persons should not take the law into their own hands, but follow the advice of Lord Hale and appeal to a Court of Justice" (*Earl of Lonsdale v. Nelson*, 2 B. & C. 311). In abating nuisances of rights of common or obstructions of a right of way notice is not strictly necessary, unless the encroachment is a dwelling house in actual occupation.

A distinction has been taken between nuisances of commission and nuisances of omission, and it is said that, if the plaintiff was the original wrong-doer, and himself erected the nuisance, it may be abated without notice; but, if the nuisance was created by another, and the plaintiff succeeded to his possession of the *locus in quo* afterwards, then notice to remove must be given in order to make out a justification (*Jones v. Williams*, 11 M. & W. 176).

2. *Damages.*—The measure of damages is the diminution in the saleable value of the property in consequence of

the nuisance (*Tucker v. Newman*, 11 Ad. & E. 41). The plaintiffs must prove some special damage.

In cases of **continuing nuisance**, the Court cannot lawfully give damages in respect of any injury subsequent to the day of the commencement of the action, for every day that the nuisance continues there is a fresh cause of action, in respect of which further damages are recoverable. But if substantial damages are once given and a fresh action is brought for the continuance of the nuisance, exemplary damages may be given to compel an abatement (*Battishill v. Reed* 18 C. B. 696). In the case of continuing actionable nuisance the jurisdiction of the Court to award damages, instead of injunction, ought only to be exercised under very exceptional circumstances. Damages may be given, instead of an injunction, when the following requirements are all found in conjunction, *viz.*, where the injury to the plaintiff's rights is—(1) small; (2) capable of being estimated in money; (3) capable of being adequately compensated by small sum; and (4) when an injunction would be oppressive (per Smith, L. J. in *Shelfer v. City of London Elec. Light. Co.*, (1895) 1 Ch. 287).

It is no answer to an action for nuisance that the plaintiff knew that there was a nuisance and yet went and lived near it (*Hall v. Barlow*, 27 L. J. C. P. 208).

3. **Injunction.**—In order to obtain an injunction it must be shown that the injury complained of as present or impending is such as by reason of its gravity, or its permanent character, or both, cannot be adequately compensated in damages (*Cooke v. Forbes*, 5 Eq. 165). The injury must be either irreparable or continuous. It is not a necessary condition of obtaining an injunction to show material specific damage. Continuous interference with a legal right in a manner capable of producing material damage is enough (*Clowes v. Staffordshire Potteries Co.*, 8 Ch. D. 125).

Any one seeking an injunction to restrain an alleged future nuisance, public or private, must shew a strong case of probability that the apprehended mischief will in fact arise (*Att.-Gen. v. Manchester Corporation*, (1893) 2 Ch. 87). Occurrences of nuisance, if temporary and occasional only, are not grounds for the interference of a Court by injunction except in extreme cases (per Turner, L. J., in *Swaine v. G. N. Ry.*, 4 De G. J. & S. 211; *Att.-Gen. v. Mayor of Preston*, 13 T. L. R. 14: see also, *Att.-Gen. v. Sheffield Gas Co.*, 3 De G. M. & G. 304.; *Att.-Gen. v. C. G. R. Co.*, L. R. 4 Ch. App. 71; *Att.-Gen. v. Mayor &c. of Preston*, 13 T. L. R. 14).

A perpetual injunction was granted to restrain the defendant from allowing noxious and offensive refuse water to flow from his manufacturies into an old pit on his land, but which percolated underground into the defendant's collieries (*Turner v. Mirfield*, 34 Beav. 390). An injunction was granted to restrain the defendant from using his cesspool in such a manner as by percolation of water through the soil to pollute defendant's well (*Womersley v. Church*, 17 L. T. 190).

*Indian case.*—The finding that a certain construction would be a nuisance to the occupants of an adjacent house whenever such house might be occupied is a sufficient basis for the granting of an injunction; it is not necessary that at the time of suit the house, in respect of which the injunction is claimed, should in fact be occupied (*Prag Das v. Ori*, 21 A. W. N. 23).

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## CHAPTER XXI.

### NEGLIGENCE.

NEGLIGENCE is the omission to do something which a reasonable man, guided upon those considerations which ordinarily regulate the conduct of human affairs, would do, or doing something which a prudent and reasonable man would not do (per Alderson, B., in *Blyth v. Birmingham Water Works Co.*, 11 Ex. D. 784; *Bridges v. Directors of N. L. Ry.*, L. R. 7 H. L. 232).

The most formally scientific analysis of 'negligence' is that of Austin. He draws a distinction between negligence, heedlessness, and rashness, which, though closely allied, "are broadly distinguished by differences."

In cases of *negligence*, the party performs not an act to which he is obliged; he breaks a positive duty.

In cases of *heedlessness* or *rashness* the party does an act which he is bound to forbear; he breaks a negative duty.

In cases of *negligence*, he adverts not to act which it is his duty to do.

In cases of *heedlessness*, he adverts not to *consequences* of the act he does.

In cases of *rashness*, he adverts to those consequences of the act; but by reason of some assumption *which he examines insufficiently*.

The state of mind called negligence may proceed either from heedlessness, where the negligent person has not in his mind the consequences of his act, or from rashness, where he has the consequences in his mind, but thinks on insufficient grounds that they will not follow.



The standard by which to determine whether a person has been guilty of negligence is the conduct of the prudent or careful or diligent man. The question to be raised with regard to a man's conduct brought in question is, whether a prudent or careful or diligent man of his calling or business or skill would have undertaken to do the thing in question, supposing the party to have exercised due care in executing the work undertaken. When an act has been undertaken by a person whose business or profession covers the doing of acts of the kind in question, the question to be decided is, whether that skill or care or diligence has been exercised which a prudent man of the same business would have exercised in the same situation (*Bigelow*, 281).

In regard to omissions (after overt acts) to perform acts not distinctly and certainly required by law, the question of the duty to perform them is to be decided by the general practice of prudent or careful or diligent men of the same occupation, when such a practice exists. When no such practice exists, the question is decided upon the reasonably supposable conduct of the prudent man acting under the circumstances (*ib.*).

The test of the prudent man's conduct holds good where the defendant was at the time engaged in his own business or avocation, or in some other in which he has acquired skill, or in something which all men can do alike (as, for instance, drawing water). Within these limits the test requires that the defendant should be judged by the conduct of the prudent man engaged in the particular labour of his own calling (unless, it be a thing which all can do alike), whether he be a digger of ditches or a worker in steel.

Beyond cases of this class the test fails; and if it be made to appear that the defendant has stepped out of his

own business, it should seem that a *prima facie* case had been made against him. The Judge would not presume the defendant to have skill in all kinds of business; and it would, therefore, be for the party to satisfy the Court that he had acquired the skill of a competent man of that business. And then it would be necessary to show that he had exercised his skill as the prudent man of that business would have done. In a word, the standard of a man *dehors* his own business is both skill in the thing assumed and the conduct of the prudent man.

**Degree of care.**—The amount of caution required of a citizen in his conduct is proportioned to the amount of apparent danger. In estimating the probability of a danger to others, we are entitled to assume, in the absence of anything to show the contrary, that they have the full use of common faculties, and are capable of exercising ordinary caution.

The normal measure of the caution required from a lawful man must be fixed with regard to other men's normal powers of taking care of themselves, and abnormal infirmity can make a difference only when it is shown that in the particular case it was apparent.

On the other hand, it seems clear that greater care is required of us when it does appear that we are dealing with persons of less than ordinary faculty. Thus, if a man driving, or a cyclist, sees that a blind man, an aged man, or a cripple is crossing the road ahead, he must govern his course and speed accordingly. He will not discharge himself, in the event of a mishap, merely by showing that a young and active man with good sight would have come to no harm. In like manner, if one sees a child, or other person manifestly incapable of normal discretion, exposed to risk from one's action, it seems that proportionate care is required; and it further seems on principle immaterial that

the child would not be there but for the carelessness of some parent or guardian or his servant (*Pollock*, 441).

A man who traverses a crowded thoroughfare with edged tools, or bars of iron, must take especial care that he does not cut or bruise others with the thing he carries. Such a person would be bound to keep a better look out than the man who merely carries an umbrella; and the person who carries an umbrella would be bound to take more care in walking with it than a person who has nothing at all in his hands.

An action for negligence proceeds upon the idea of an obligation on the part of the defendant to use care, and a breach of that obligation to the plaintiff's injury (*Swan v. North British Austro. Co.*, 7 H. & N. 603; *Svami Nayudu v. Subramania*, 2 M. H. C. 158). In order to render a person liable for an act of negligence, which he did not *himself* commit, it must be shewn by the person injured, either that the person sought to be made liable authorized the act of negligence complained of, or that it was committed by his servant in the course of his employment or that he owed such a duty to the person injured that he could not, by delegating its performance to a contractor, rid himself of the duty (per Smith, L. J., in *Hardaker v. Idle Dist. Council*, (1896) 1 Q. B. 344). To enable the plaintiff to maintain an action it is not necessary that the duty neglected should have arisen out of a contract between the plaintiff and defendants. However the duty may arise, whether by a statute or otherwise, if it exists and is neglected to the injury of the plaintiff, he has a right to sue for damages (*Collett v. L. & N. W. Ry.*, 16 Q. B. 984).

*Breach of statutory duties.*—If things authorised to be done by a statute are carelessly or negligently done, an action is maintainable for damages (*Manley v. St. Helen's*

*Exc. Ry.*, 2 H. & N. 840). "Powers given by statute are not to be used to the peril of the lives or the limbs of the Queen's subjects. They are to be exercised reasonably, and with due care, so as not by negligence to cause damage to others" (per Watson, B., in *Manley v. St. Helen's Canal & Ry.*, 2 H. & N. 840). And, if by a reasonable exercise of the powers, either given by the statute to the promoters, or which they have at Common law, the damage could be prevented, it is negligence within this rule not to make such reasonable exercise of their powers. Where the law casts a duty upon a person which he wrongfully fails to perform, he is answerable in damages to those whom his wrongful failure injures (*Ferguson v. Kinnoul*, 9 Cl. & F. 251). Nothing is clear than the duty of performing the act unless there are good grounds distinctly specified by the law for the non-performance (*Ponnusamy v. Collector of Madura* 3 M. H. C. 37). Where a statute imposes a duty, it, without express words, gives an action for the failing to perform that duty, and for wrongfully performing it (*ibid*).

In connection with this subject the following principles should be noted—

1. When a statute gives a right, or creates a duty, in favour of an individual or class, then, if no penalty is attached, any infringement of the right or breach of the duty will be a tort remediable in the ordinary way.

2. But where a penalty is attached (whether recoverable by the party aggrieved or not), it then becomes a question of construction whether the legislature intended that the penalty should be the only satisfaction, or whether, in addition, the party injured should be entitled to sue for damages.

3. In the case of a private act imposing an active duty, the penalty will *prima facie* be taken to be the only remedy given for breach of the duty.

4. Where a duty is created by a statute for the purpose of preventing a mischief of a particular kind, a person who, by reason of another's neglect of the statutory duty, suffers a loss of a different kind, is not entitled to maintain an action for damages in respect of such loss (*Gorris v. Scott*, L. R. 9 Ex. 125).

5. Unless a statute expressly or by necessary implication restricts Common law rights such rights remain unaffected (*Underhill*).

**Defendant liable.**—Where the plaintiff was in occupation of certain farm buildings and of corn standing in a field adjoining the field of the defendant, and the defendant stacked his hay on the latter, knowing that it was in a dangerous state and likely to catch fire, and it subsequently did ignite and set fire to the plaintiff's property, it was held that the defendant was liable (*Vaughan v. Menlove*, 3 Bing. N. C. 468). The plaintiff was travelling by the defendant's tramcar and when the tramcar arrived at the point where she wanted to get down, she asked the conductor to stop the car, and he rang the bell and then went up on the top of the car to collect the fares. The tramcar, however, did not stop, and accordingly she pulled the bell-cord inside the car, and, while the car was still in motion, she went out on to the footboard and stood close to the step. The car slowed down and came almost to a standstill, but did not stop, and the plaintiff was jerked off the car and injured. It was held that the defendants were liable for the negligence of their servants (*Hall v. London Tramways Co.*, 12 T. L. R. 611 : in which, *Baird v. S. L. T. Co.*, 2 T. L. R. 766 was overruled; and *Foulkes v. N. L. Ry.*, 8 T. L. R., was doubted). A railway company had connected two platforms by means of a wooden bridge, which were found to be in a dangerous condition; there was a second bridge at another point of the platform. At the place through which the deceased fell there was a descent of eight or ten steps, between which and the handrail at the side there was an opening of about seven feet by four without any protection. The bridge had been in use for ten years; the accident happened on a moonlight night, but was the first that had ever happened although thousands of people (including the plaintiff) had used the bridge before. The company was held liable (*Longmore v. G. W. Ry.*, 19 C. B. N. S. 183).

**Indian cases.**—Leaving a door of a carriage open or unfastened amounts to negligence on the part of a railway company for the consequences of which the company is liable to passengers (*Bromley v. G. I. P. Ry.*, 1 Bom. L. R. 254; 24 Bom. 1). The defendant Municipality excavated a trench for

a pipe-drain in a public lane. This trench remained open for some time, and owing to a heavy fall of rain water collected in it, and by percolation or saturation a considerable subsidence took place causing a very heavy damage to plaintiff's houses, close by the trench. Held, that the keeping of the drain open for a considerable time amounted to negligence and the defendant was therefore liable (*Vithaldas v. Municipal Commissioner of Bombay*, 4 Bom. L. R. 914).

*Breach of statutory duty.*—A suit for compensation for wrongful seizure of cattle will lie in a civil Court, the provisions of Act I of 1871, being no bar to such a suit. The peculiar remedy for the wrongful seizure of cattle, and the special limitation provided for it under the above Act, do not exclude the ordinary remedy which a man possesses under the law (*Shuttrughon v. Hokna Shewtal*, 16 Cal. 159). Where a railway company allowed the rain water to flow for some four miles by the sides of their railway line through gutters made up of the continuous burrow-pits and then allowed it to discharge itself on the lands of the plaintiff, the railway company was held not to have exercised the powers conferred by Indian Railway Act (IX of 1890) and was held liable for negligence (*Gaekwar v. Katcharabhai*, 2 Bom. L. R. 357; on appeal, 5 Bom. L. R. 405). A Court will interfere by injunction to restrain acts of public functionaries in excess of their statutory powers (*Chabildas v. Municipal Commissioner of Bombay*, 8 Bom. H. C. O. C. J. 85; *Brindabun v. Municipal Commis. of Serampore*, 19 W. R. 309).

**Defendant not liable.**—The defendant bought a horse and the next day took him to “try” him in a much frequented thoroughfare. From some unexplained cause the horse became restive, and, notwithstanding the defendant's well-directed efforts to control him, ran up the pavement and killed a man. It was held that these facts disclosed no evidence of negligence on the part of the defendant (*Hammack v. White*, 11 C. B. N. S. 588). A horse drawing a brougham under the care of the defendant's coachman in a public street, suddenly, and without any apparent cause, bolted, and notwithstanding the utmost efforts of the driver to control him, swerved on to the footway and injured the plaintiff. The driver did not call out and give any warning, and it was shown in evidence that the horse cast a shoe shortly after the accident; but it was held that there was no evidence to go to jury (*Manzoni v. Douglas*, 6 Q. B. D. 145). Where the defendant's horses driven by the defendant's servant bolted, and became so unmanageable that the servant could not stop them, but could, guide them, to some extent; and while trying to safely turn a corner, they knocked down and injured the plaintiff. In holding that the defendant was not guilty of negligence, the Court remarked: “The driver is absolutely free from all blame in the matter. Not only does he not do anything wrong, but he endeavours to do that which is best under the circumstances. The misfortune happens through the horse-

being so startled by the barking of a dog that they ran away with the groom, and the defendant who is sitting beside him. Now, if the plaintiff, under such circumstances, can bring an action, I really cannot see why she could not bring an action because a splash of mud, in the ordinary course of driving, was thrown upon her dress, or got into her eye, and so injured her. It seems manifest that, under such circumstances, she could not maintain an action" (per Bramwell, B., in *Holmes v. Mather*, L. R. 10 Ex. 261). Where the declaration alleged that the defendant wrongfully and negligently hung a chandelier in a public house knowing that the plaintiff and others were likely to be under the chandelier, that if not properly hung it would probably fall upon them, and that the chandelier fell upon the plaintiff; it was held that the declaration did not disclose any duty by the defendant to the plaintiff for the breach of which an action could be maintained, as it did not appear that the plaintiff was in the public house in the exercise of any right available against the defendant. "There would be no end of actions if we were to hold that a person, having once done a piece of work carelessly, should, independently of honesty of purpose be fixed with liability in this way by reason of bad materials or insufficient fastening" (per Willes, J., in *Collis v. Seldon*, L. R. 3 C. P. 495). Where a waterworks company under their Act laid down a main under a turnpike road, the soil of which and of the land on either side was vested in B and negligently permitted the main to leak, whereby C, who had entered into a contract with B to make a tunnel under the road, was delayed in his work, so that his contract became unprofitable, it was held that C had no cause of action against the company (*Cattle v. Stockton W. Co.*, L. R. 10 Q. B. 453). A was employed by B to watch certain unfinished buildings. C, a contractor, employed workmen near the spot, who were working a steam-crane and winch. A was standing, where he need not have been, watching the workmen of C. A bucket attached by a chain to the winch passed close over his head, and the chain breaking, fell with its contents on him, and severely injured him. In the ordinary course of things nobody would have taken up his stand as A did under the bucket. C, therefore, was not bound to guard against the probability of persons being injured in that way (*Batchelor v. Fortesque*, L. R. 11 Q. B. 474). Where a ladder from some unexplained cause fell against the window of a room in the defendant's house, in which it had been placed, and a piece of glass fell and injured the plaintiff who was passing by at the time, it was held that the defendant was entitled to judgment (*Higgs v. Maynard*, H. & R. 581). There were two doors on the platform of a railway station, the one marked "For gentlemen," the other "Lamp-room." The plaintiff desiring to go to the urinal opened by mistake the lamp-room door, fell down some steps and was injured; it was held that the company was not liable (*Toomley v. London & B. Ry.*, 3 C. B. N. S. 146). The stair-case leading to the plat-

form of a railway station had a brass nosing which had become worn and slippery from constant use. The plaintiff slipped and was injured. It was shown by evidence that brass was an improper thing for the surface of the stairs, and that lead would have been better because less slippery. It was held that this was not conclusive proof of the company's negligence (*Crafter v. Metropolitan Ry.*, L. R. 1 C. P. 300).

*Indian case.*—The plaintiff was the owner of a piece of land, adjoining a railway line, on which was erected a bungalow, with stables and out-houses adjoining. In an action brought by the plaintiff against the railway company to recover compensation for damages occasioned by a fire caused by a spark from one of the engines of the company, the plaintiff alleged want of due care on the part of the defendants in the management of the line by allowing dry grass of too great a length to remain on the railway banks, and in driving their engines along the line without due precautions being taken to prevent the expulsion of sparks. It was held that the defendant company was authorized to run locomotive engines, and therefore the company was not liable for damage without proof of negligence; and that neither in the construction of their engines, nor in the condition of the railway banks, was any negligence shown on the part of the company (*Halford v. E. I. Ry.*, 14 B. L. R. 1).

### *Intervention of third parties.*

In actions of negligence, as in other actions of tort, the wrong-doer is answerable only for such consequences as are the natural and usual consequences of his wrongful act. It must be noticed, however, that the intervention of the agency of third parties does not under all circumstances prevent an injury being traced back to an original wrong-doer (*Ball*). "If I am guilty of negligence in leaving anything dangerous in a place where I know it to be extremely probable that some other person will unjustifiably set it in motion to the injury of a third, and if that injury should be so brought about, I presume that the sufferer might have redress by action against both or either of the two, but unquestionably against the first" (per Lord Denman, in *Lynch v. Nurdin*, L. R. 1 Q. B. 35).

Not far different from the case in which the intervening agent has acted involuntarily is that in which he has acted *innocently* or with *excusable ignorance*.



The defendant, being possessed of a loaded gun, sent a young girl to fetch it, with directions to take the priming out, which was accordingly done, and damage accrued to the plaintiff's son in consequence of the girl's presenting the gun at him and drawing the trigger, when the gun went off; it was held that the defendant was liable to damages (*Dixon v. Bell*, 5 M. & S. 198). The defendant having left his horse and cart for a long time unattended in the street, where some little boys were at play, some of the boys got into the cart, and another boy fell off the shafts and got his heel crushed under the wheel; it was held that the defendant was responsible for the injury (*Lynch v. Nurdin*, *sup.*). Plaintiff delivered to defendant a horse to be agisted in a certain field next to a cricket ground into which the horse escaped through a gate left open by defendant's servant. On the cricketers trying to drive it back in a careful manner, the horse injured itself in trying to jump the fence. Held, that the damage was the natural consequence of the gate having been left open, and that defendant was liable (*Halestrap v. Gregory*, (1895) 1 Q. B. 561).

The case presents more difficulty where the intervening agent acted not involuntarily or with excusable ignorance, but *negligently*. Here there are *two* wrong-doers. It would seem that since the injury was actually occasioned by the act of the latter or immediate agent, he only, and not the original wrong-doer, should be liable. But there is another view which may be taken of the circumstances, *viz.*, that whilst in time the wrongful acts are successive, nevertheless in fact they are *joint*, since *ex hypothesi* neither act, of itself, and without the other act, would have caused the injury (*Ball*).

The owner of a horse and cart had negligently left them standing in the street, and a passer-by struck the animal causing him to back into the plaintiff's window, it was held that the owner of the horse was liable (*Illidge v. Goodwin*, 5 C. & P. 190). The defendants' servants shunted some vehicles on to a siding which was an incline running down to a level crossing. The siding had a catch-point which would have prevented the vehicles if set loose from running down the incline, but, for the convenience of their shunting operations, the defendants' servants did not place the vehicles beyond the catch-point, but screwed down their brakes, and left them in a position in which they would not have caused any damage if not interfered with. Some boys trespassing on the siding, unscrewed the brakes and detached a vehicle, which ran down the incline and injured the plaintiff who was passing over the level-crossing. Held, that the defendants were liable for the damage

sustained by the plaintiff, since they were aware that boys were in the habit of trespassing on the siding and meddling with the vehicles, and negligently omitted to take reasonable precautions to prevent the consequences of that interference (*McDowall v. G. W. Ry.*, (1902) 1 K. B. 618). The defendants contracted to supply the plaintiff with a proper gas-pipe. Gas escaped from a defect in the pipe supplied, and the servant of a third person negligently took a lighted candle into the room from whence the escape proceeded, and the result was an explosion causing damage to the plaintiff's stock and premises; it was held that the plaintiff was entitled to recover for the damage sustained. The Appeal Court confirmed this judgment on the ground of breach of contract and not of negligence (*Burrows v. March Gas Co.*, L. R. 5 Ex. 67). The defendants had a cellar opening to the street. Their men had taken up the flap of the cellar for the purpose of lowering casks into it, and having reared it against the wall nearly upright with its lower base, upon which there were cross-bars towards the street, had gone away. The plaintiff in one of the actions, a child five years old, got upon the cross-bars of the flap, and in jumping off them brought down the flap on himself and on another child, the plaintiff in the other action, and both were injured. It was held that while the plaintiff whose act had caused the flap to fall could not recover, the other plaintiff who had been injured could recover *provided he had not been playing with the other, so as to be a joint actor with him* (*Hughes v. Macfie, Abbot v. Macfie*, 2 H. & C. 714). The defendant had exposed in a public market-place a machine for crushing oil-cake. The handle was affixed, the machine was in working order, and no person was left to take care of it. The plaintiff, a boy four years of age, returning from school with his brother, a boy of seven, and some other boys, stopped at the machine. One of the boys began to turn the handle; the plaintiff, at the suggestion of his brother, placed his hands on the cogs of the wheels, and the machine being set in motion three of his fingers were crushed. It was held that the defendant was not liable, because there was no negligence on the part of the defendant, or if there was negligence it was too remote; and secondly, because the injury was caused by the act of the boy who turned the handle and of the plaintiff himself who was a trespasser (*Mangan v. Atterton*, 3 H. & C. 388).

### *Contributory negligence.*

Contributory negligence is negligence in not avoiding the consequences arising from the negligence of some other person, when means and opportunity are afforded to do so (per Coleridge, J., in *Clayards v. Dethick*, 12 Q. B. D.

445). It is the non-exercise by the plaintiff of such ordinary care, diligence, and skill as would have avoided the consequences of the defendant's negligence. The doctrine of contributory negligence is founded upon the maxim *in jure non remota causa sed proxima spectatur*, and contributory negligence in law is that sort of negligence on the part of a plaintiff which is the proximate and not the remote cause of the injury. It does not mean, therefore, any negligence on the part of the plaintiff which contributes to an accident of which he complains, but only such negligence as could not have been avoided or counteracted by the care of the defendant (*Smith*). The law, thus, takes into consideration any act or conduct of the party injured or wronged which may have immediately contributed to that result. This is upon the principle of what has been termed "culpa-compensation," where the "culpa" on one side compensates for the "culpa" on the other; and the reason for admitting it is, that the casual connection between the act and damage is interrupted by the "culpa" or negligent conduct of the injured party. Where such conduct can be proved, the party will be considered in law to be the author of his own wrong, and it will be fatal to any action on his part based on the injury. Because the rule of law is that a person who suffers a damage by his own fault is really not deemed to have suffered any legal damage: *quod quis ex culpa sua damnum sentit, non intelligitur damnum sentire* (*Rattigan*).

The doctrine of contributory negligence is governed by the following principles:—

1. Wherever the *immediate* and *proximate* cause of the damage is the plaintiff's own supineness, carelessness, or unskilfulness, he has no ground of action against the defendant, though the primary and original cause of damage be the defendant's wrongful act (*Young v. Grote*, 4 Bing.

253; *Tuff v. Warman*, 5 C. B. N. S. 585; *Davies v. Mann*, 10 M. & W. 549).

2. Although a defendant proves a plaintiff to have been negligent, he does not thereby disentitle him to recover in respect of the defendant's own negligence producing the injury and damage complained of, unless he in addition proves one of the two propositions—(1) that the plaintiff might have avoided the consequences of the defendant's negligence by the exercise of ordinary care (*Bridge v. Grand Junction Ry.*, 3 M. & W. 244); or (2) that the defendant could not have avoided the consequences of the plaintiff's negligence by the exercise of ordinary care (per Lord Penzance in *Radley v. L. & N. W. Ry.*, 1. App. Cas. 759; *The Bernina*, 12 P. D. 36; *Tuff v. Warman*, 5 C. B. N. S. 585; *Madhav Raw v. Fernandes*, 17 Mad. 368).

3. Where the *immediate* cause of the accident is the defendant's fault, so that without it the accident could not have happened at all, it is no answer that, only for the plaintiff's negligence in something *collateral* to the immediate cause of the injury, it or part of it might have been avoided (*Rigby v. Hewitt*, 5 Ex. D. 240; see *Plower v. Adams*).

Contributory negligence, to afford a defence, must be that of the plaintiff himself or of his servants, whom he has selected from his knowledge or belief in their care or skill: the contributory negligence of a third person, not being the servant of the plaintiff, will not suffice (*The Bernina*, 12 P. D. 58; *Spaight v. Tedcastle*, 6 App. Cas. 217; *Hector*, 8 P. D. 218).

Upon the issue of contributory negligence the burden of proof at the commencement of the trial is upon the defendant (*Dublin Wicklow Ry. v. Slattery*, 3 App. Cas. 1169; *Wakelin v. Lond. & S. W. Ry.*, 12 App. Cas. 47), and the plaintiff is not bound in the first instance to give any evidence to negative the existence of it.

**Defendant liable.**—An action was instituted against the pilot of a steamer in the Thames for running down the plaintiff's barge, and it was proved that there was no look-out on the barge ; it was held that defendant was liable (*Tuff v. Warman*, 2 C. B. N. S. 740). The owner of a donkey fettered his forefeet, and, in that condition, turned it into a narrow lane. It was run over by a heavy waggon belonging to the defendant. The waggon was going a little too fast, and was not properly looked after by its driver ; the consequence was that it caught the poor beast, which could not get out of the way, and killed it. The owner of the donkey sued the owner of the waggon, and, in spite of his own negligence, was allowed to recover, on the ground that if the driver of the waggon had been *decently careful* the consequence of the plaintiff's negligence would have been averted. "Although the ass may have been wrongfully there, still the defendant was bound to go along the road at such a pace as would be likely to prevent mischief. Were this not so, a man might justify the driving over goods left on a public high-way, or even over a man lying asleep there, or the purposely running against a carriage going on the wrong side of the road " (per Parke, B., in *Davies v. Mann*, 10 M. & W. 547).

**Railway cases.**—Some colliery proprietors had a siding from the London and North Western Railway Company's line, and over the siding a bridge with a headway of eight feet. The railway company negligently pushed a loaded truck eleven feet high against the bridge and broke it down. It appeared that the colliery proprietors as well as the railway company had been negligent in the matter, for they ought to have foreseen what was going to happen, as the loaded truck had been standing about some time ; but in spite of this negligence they were held entitled to recover against the railway company for the damage done to the bridge, as the defendants, by the exercise of ordinary care, might have averted the mischief (*Radley v. L. & N. W. Ry.*, 1 App. Cas. 754 ; *Curtin v. G. S. & W. Ry.* 22 L. R. Ir. 219). The plaintiff was leaning against the door of his compartment, when the door opened and he fell out. It was held that he could recover, because his act was not a negligent one, that is, not one which a reasonable man careful of his own safety would not do ; and that he was justified in assuming that the company's servants had done their duty by fastening the door (*Gee v. M. Ry.*, 42 L. J. Q. B. 105). Where there was an abrupt turning or tunnel so that the person could not see the train coming, the Court thought that it was not contributory negligence for the plaintiff to cross the line (*Bilbee v. L. & B. K. Ry.*, 18 C. B. N. S. 584). The defendant's guard, without warning, forcibly closed the door of a railway carriage, thereby injuring plaintiff's hand, it was held that defendant was liable, there being no contributory negligence on the plaintiff's part (*Fordham v. L. B. & S. C. Ry.*, L. R. 3 C. P. 368).

**Indian cases.**—If any inconvenience or danger is caused by the negligence of a railway company a passenger may lawfully attempt to get rid of such inconvenience or danger, provided in doing so he runs no obvious risk,

disproportionate to the inconvenience or danger, and is not himself guilty of any negligence and if in such attempt he is injured the company is liable in damages (*Bromley v. G. I. P. Ry.*, 1 Bom. L. R. 255, 24 Bom 1). Plaintiffs, who were the legal representatives of one G. sued for compensation, under Act XIII of 1855, for loss sustained, by the death of the said G, which, it was alleged, was caused by injuries received in a railway accident occasioned by the negligence of defendants' servants. The lower Court having given a decree for plaintiffs, defendant appealed to the Chief Court, and it was then contended, on his behalf, that although G's injuries were caused by the negligence of defendants' servants the cause of action was the death of G, and that inasmuch as death would probably not have ensued but for the plaintiffs' imprudently removing G from the hospital to which he had been taken after the accident, plaintiffs had been guilty of contributory negligence such as disentitled them to recover compensation. Held, that the cause of action was the wrongful act on the part of defendants' servants resulting in injuries which caused the death of G, and not the death simply, although the cause of action was not complete for the relations until death occurred, death being an essential constituent of the cause of action, and, that therefore the plaintiffs' imprudent conduct in removing G from the hospital, being subsequent to the negligence which caused the injuries, did not constitute contributory negligence or disentitle them to compensation. The removal of the deceased from hospital was to be regarded merely as of one the natural and probable consequences of the infliction of the injuries it having admittedly been done *bona fide* for the benefit of the deceased by a relation (*Secretary of State v. Muhammed*, P. R. 85 of 1894).

**Defendant not liable.**—The defendant was engaged in the enterprise of enlarging and improving his house. In carrying out his repairs he illegally put poles across a highway. One evening while things were in this improper state, the plaintiff was riding home. He went galloping through the streets "as fast as his horse could go"; and in doing so he rode plump up against the defendant's obstruction and had a nasty fall. He brought an action for damages, but his own careless riding was held to be as complete an obstacle to his success as the defendant's pole had been to his horse. "A party is not to cast himself upon an obstruction which has been made by the fault of another and avail himself of it, if he do not himself use common and ordinary caution to be in the right..... one person being in fault will not dispense with another's using ordinary care for himself" (per Lord Ellenborough, in *Butterfield v. Forrester*, 11 East 60; *Heland v. Lowell*, 3 Allen 407).

Where some bricklayers employed by the defendant had wrongfully laid several barrowfuls of lime rubbish before the defendant's door, by the side of a highway, and, while the plaintiff was passing in his chaise, the wind raised a whirlwind of this rubbish, which frightened the plaintiff's horse and caused it to start on one side, in the direction of an approaching

waggon, and the plaintiff to prevent the horse from running against the waggon pulled him sharply round and the horse then ran over a lime heap lying before another man's door and the shaft was broken by the shock and the horse being then still more frightened ran away and upset the chaise, and threw the plaintiff out and injured him; it was held that although the defendant was to blame for putting the rubbish by the side of the road, yet if the plaintiff's running against the second heap of rubbish was owing to his pulling the horse round too sharply, the immediate cause of the injury was his own unskilfulness in the management of the horse, rather than the original wrongful act of the defendant (*Flower v. Adam*, 2 Taunt. 314). It was held not to be contributory negligence on the part of a ship-master to rely upon another ship taking a course which under the circumstances was the course which ought in the exercise of reasonable care to have been taken (*Venual v. Gardner*, 1 C. & M. 21).

*Railway cases.*—The plaintiff, on entering a railway carriage, left his hand on the edge of the door half a minute after so entering, and the guard gave warning before shutting the door. Held, that the accident was attributable to his contributory negligence, in leaving his hand carelessly upon a door which he must have known would be immediately shut. But for that fact no accident would have happened (*Richardson v. Metropolitan Ry.* L. R. 3 C. P. 374). There is no duty cast upon the servants of a railway company to give warning of the shutting of a carriage door to passengers who are actually seated inside the carriage and are not in the act of getting in or out of it (*Drury v. N. E. Ry.*, (1901) 2 K. B. 322). The door of a railway carriage had opened several times of its own accord. There was room in the carriage for the plaintiff to sit away from the door, and the train would have stopped in three minutes at a station. In endeavouring to shut it for the fourth time he fell out and was injured; it was held he could not recover (*Adams v. L & Y. Ry.*, L. R. 4 C. P. 739). The defendants' railway crossed a public foot way on the level. The plaintiff, while crossing from the down side to the up side of the railway, was knocked down and injured by a train on the up line. The plaintiff stated that before crossing he looked to the right along the down line, but he admitted that he did not look to the left along the up line, and that if he had looked he must have seen the train coming. The driver did not whistle, and the gate keeper gave no warning. Held, that the plaintiff's own want of caution was the sole cause of the accident (*Davey v. L. & S. W. Ry.*, 12 Q. B. D. 70). Deafness of a person crossing a railway line is contributory negligence in him if by reason of that defect he is unable to hear a warning given to him by the company's servants in charge at the crossing (*Skelton v. L. & N. W. Ry.*, 36 L. J. C. P. 249; *Stubley v. L. & N. W. Ry.*, 1 Ex. 13).

*Leading cases.*—**Tuff v. Warman : Davies v. Mann :**  
**Butterfield v. Forrester.**

**Admiralty law.**—The Common law rule of contributory negligence is unknown to the maritime law administered in Courts of Admiralty jurisdiction. Under a rough working rule commonly called *judicium rusticum*, and apparently derived from early medieval codes or customs, with none of which, however, it coincides in its modern application the loss is equally divided in cases of collision where both ships are found to have been in fault (*Pollock*). This principle was adopted in *Haji Abdulla Haji v. ss. Deccan*, (Unrep. Bom. 1893).

*Contributory negligence of children.*

The rule as to contributory negligence is not inflexibly applied in cases where young children are concerned. Allowance is made for their inexperience and infirmity of judgment (*Lynch v. Nurdin*, 1 Q. B. 29; *Grizzle v. Frost*, 3 F. & F. 622; *Hughes v. Macfie*, 2 H. & C. 744; *Crocker v. Banks*, 4 T. L. R. 324). In the case of very young children, the rule seems to be that an infant can recover, although its conduct contributed to the injury, if the defendant is shown to have failed in his duty to the infant (*Jewson v. Gatti*, 2 T. L. R. 341; see *Mangan v. Atterton*, L. R. 1 Ex. 239). If a child is guilty of what in a grown up person would be mere negligence and nothing more, the child will not be disentitled to relief.

Where, however, the child is guilty, not of mere carelessness in the doing of a lawful act, but of a wholly unlawful act such as a wilful and intentional trespass, such conduct will in all cases afford a defence irrespective of the age of the child (*Hughes v. Macfie*, 2 H. & C. 744; *Mangan v. Atterton*, L. R. 1 Ex. 239).

Where the defendant left his horse and a cart for a long time unattended in the street, where some little boys were at play, and some of the boys got



into the cart, and another boy led the horse forward to give them a ride and one boy fell off the shafts and got his leg crushed under the wheel, it was held that the defendant was responsible for the fall and the broken leg, as it was the natural result of his misconduct in leaving the cart unattended, and that the boy, in consequence of his tender years and natural instinct for play and want of reflection and foresight, could not be considered legally responsible for the damage he had sustained, so as to be precluded from recovering compensation from the defendant (*Lynch v. Nurdin*, 1 Q. B. D. 29). This case was doubted in *Lugo v. Newbold*, 9 Ex. D. 302 and *Lay v. Midland Ry.*, 34 L. T. 30). The owner of a rotten fence adjoining a highway is liable to a boy who in attempting to climb it (which he has no right to do), is crushed and otherwise injured (*Harrold v. Watney*, (1898) 2 Q. B. 320).

Where the defendant left the wooden covering of a cellar leaning against the wall, and the plaintiff, a child of seven years old, got upon it and jumped from it in play, by means of which it fell upon and injured him, it was held he could not recover (*Abbott v. Macfie*, 2 H. & C. 744). The defendant left unattended a machine which any one could set in motion, and plaintiff, aged four, by his brother's direction, put his hands in the machine while his brother turned the wheel; the plaintiff was injured, but it was held that defendant was not liable (*Mangan v. Atterton*, L. R. 1 Ex. 239). Where the plaintiff aged three was injured by a passing train while sitting on a railway parapet, it was held that the defendant company was not liable (*Singleton v. Eastern C. Ry.*, 7 C. B. N. S. 287. See also, *Gardner v. Grace*, 1 F. & F. 359; *Ihl v. Forty second Str. &c.*, 7 Am. Rep. 450; *Cosgrove v. Ogden*, 10 Am. Rep. 361).

*Leading case.*—*Lynch v. Nurdin*.

### *Choice of evils.*

A choice of evils may often be all that is left to a man, and he is not to blame if he chooses one; nor even if he chooses the *greater*, if he is in circumstances of difficulty and danger at the time, and has been compelled to decide hurriedly (*Guez v. Chicago Ry.*, 52 Wis. 672; *Coulter v. Express Co.*, *ib.*, 561). Where the plaintiff is in a position such that it is his duty to do things which if done in a particular way would be dangerous, but if done in another way would not, he is bound to adopt the latter course if the choice is open to him, and not voluntarily and without necessity to expose himself to danger (*Union Ry. v. Leahy*, 9 Ill. App. 353—*Smith*).

The defendants had made a dangerous trench in the only outlet of a mew, putting up no fence and leaving only a narrow passage, on which they heaped rubbish. The plaintiff, a cabman, in the exercise of his calling, attempted to lead a horse out over the rubbish, and the horse fell and was killed; it was held that the plaintiff was not disentitled to recover because he had at some hazard created by the defendants brought his horse out of the stable (*Clayard v. Delhick*, 12 Q. B. D. 439). Where a passenger jumped from the roof of a coach and broke his leg to avail what seemed an imminent upset, and the coach was however not upset; judgment was given for the plaintiff (*Jones v. Boyce*, Stark, 493). The plaintiff was travelling in a second class carriage and was sitting close to one side of the carriage looking out. He got up, walked across to the other side of the carriage and put his hands upon the door, which at once sprang open. The left hand immediately lost its hold, but he grasped the door with his right hand arm, and hung on to it whilst it was open. He was carried in this way some 300 yards or more, when seeing the pier of an arch over the line ahead of him, and fearful of coming in contact with it, he let go and endeavoured to throw himself across a bush below him; but, not having made allowance for the momentum of the train, missed the bush and fell on the line. He was afterwards found on the ballast much injured. The Court gave judgment in favour of the plaintiff (*Stokes v. Saltonstall*, 13 Peters 181). A drove a waggon carelessly along the road and took it on to the side path. B being on the side path, and seeing the waggon coming along behind, and near her on the path, urged by sudden terror sprang aside, and sustained harm by striking her face against the wall of a building. Here A's negligence conduct had operated on B by depriving her of self control, by surprise or sudden terror, and caused her to sustain harm from the involuntary action thereby induced. A was held liable (*Coulter v. American Express Co.*, 5 Lan. 67).

### *Doctrine of identification or imputability.*

This doctrine was that where a person voluntarily engaged another person to carry him, he so identified himself with the carrier as to be precluded from suing a third party for negligence in cases where the carrier was guilty of contributory negligence (*Thoroughgood v. Bryan*, 8 C. B. 115). According to this principle, if A, travelling in B's carriage, driven by B's servant, is injured in a collision with C's carriage, the negligence of B's servant being the proximate cause of the accident, A was considered to be so identified with B as to be disentitled from suing C.

This doctrine has been expressly overruled in the case of *The Bernina* (13 App. Cas. 1), in which it is laid down that where damage is sustained by the concurrent negligence of two or more persons, there is a right of action against all or any of them at plaintiff's option, and the exception of contributory negligence extends only to the acts and defaults of plaintiff himself, or of those who are really his agents. There is, now, no longer any inference of law that the driver of an omnibus, or coach, or cab, or the engineer of a train, or the captain of a vessel, and their respective passengers, are so far identified as to affect the latter with any liability for the former's contributory negligence (*Matthews v. London Tramways Co.*, 58 L. J. Q. B. 12).

In the leading case of *Bernina*, there was a collision between two ships, both in fault. The officer in charge, the chief-engineer off duty, and a passenger, all belonging to the same ship were drowned; it was held in an action against the owners of the other ship, that the representatives of the officer in charge who was directly responsible for the navigation of the ship at the time of the collision could recover nothing, but that the representatives of the chief engineer and passenger could do so (*Mills v. Armstrong*, 13 App. Cas. 1. See also, *Little v. Hackett*, 116 U. S. 366). Where the drivers of two rival omnibuses were competing for passengers, the one endeavouring to get before the other, and both driving at great speed, and, in trying to avoid a cart which got in their way, the wheel of the defendant's omnibus came in contact with the projecting step of the omnibus on which the plaintiff was riding, and caused it to swing against a lamp post, and the plaintiff was thrown off and injured; it was held that he was not disentitled to recover damages from the proprietor of the rival omnibus, by reason of misconduct on the part of his own driver (*Rigby v. Hewitt*, 5 Ex. D. 243; *Brown v. McGregor*, Hay 10).

In *Child v. Hearn* (L. R. 9 Ex. 176), the doctrine of imputability was applied to a case not depending upon the relation of carrier and passenger. The plaintiff, a servant of a railway company, was injured by an accident to a trolley caused by some pigs which had strayed from a field belonging to the defendant, through a defective fence, on to the railway line. The railway company were under the obligation of repairing the fence in question, and it was held that as no action could have been brought by the company, so neither could their servant using his master's property for his master's service be in any better position.

*Leading case.*—**The Bernina**, or *Mills v. Armstrong*.

*Children in custody of adults.*

Persons dealing with an adult, and also with an infant or imbecile of whom the adult has charge, are entitled to expect reasonable care on the part of the adult, both for himself and for the helpless person in his charge (*Waite v. N. E. Ry.*, E. B. & E. 719).

An infant too young to take care of itself was knocked down in crossing a line, through lack of proper care on the part of the person in charge of it. In an action which was brought by the child it was held that the little boy was so identified with his grand-mother that her negligence was his, and on this ground, the plaintiff was disentitled from recovering (*Waite v. N. E. Ry.*, *sup.*).

*Indian case.*—The Bombay High Court has held that, although the mother of a child might have been guilty of negligence which contributed to the accident, yet if the defendant could by the exercise of ordinary care and diligence have avoided the mischief which happened, her negligence would not excuse him (*Narayan v. The Municipal Comm. of Bombay*, 16 Bom. 254).

*Leading case.*—*Waite v. N. E. Ry.*

## KINDS OF NEGLIGENCE.

Different writers have divided negligence in different manners, some insisting that there are only two kinds of negligence—‘*culpa levis*’ and ‘*culpa lata*’; others dividing the subject into three groups—‘*culpa lata*’, ‘*culpa*’ (including ‘*culpa levis*’), and ‘*culpa levissima*’; but it seems upon the whole to be held in the English and American Courts, that there are three sorts of negligence.

1. Gross negligence, *lata culpa*, is the omission of that care which *even inattentive and thoughtless* men never fail to take of their *own* property.

2. Ordinary negligence, *levis culpa*, is the want of that diligence which the *generality of mankind* use in their *own* concern, that is, of ordinary care.

3. Slight negligence, *levissima culpa*, is the omission of that care which *very vigilant and attentive* persons take of their *own* goods, or, in other words, of very exact diligence.

The sort of care to be taken depends upon the duty or position of the parties. The duty may be (1) for the benefit of the performer, (2) for the benefit of both parties, or (3) for the benefit of the performee; and accordingly the care required is (1) more than ordinary, (2) ordinary and (3) less than ordinary. Negligence may thus be more than ordinary, or less than ordinary. *Gross negligence* may be deemed to be the want of slight diligence, *ordinary negligence* the want of ordinary diligence, and *slight negligence* the want of great diligence (*Macpherson*).

Hence we have the three following divisions:—

1. Neglect of duties requiring skill, or an extraordinary amount of care.
2. Neglect of duties requiring ordinary care.
3. Neglect of duties requiring less than ordinary care.

In cases of pure tort there is only one standard of conduct, that of ordinary diligence; and only one criterion of diligence, the conduct of a prudent man.

#### I. NEGLIGENCE OF DUTIES REQUIRING MORE THAN ORDINARY CARE.

The law demands more than ordinary care in the following cases:—

1. Where a person is acting for his own benefit; or
2. Where he professes to have greater skill; or
3. Where a higher degree of duty has been undertaken; or
4. Where the law deems it for the public benefit to require a greater amount of care.

##### 1. *A person acting for his own benefit.*

Wherever a person does something for his own advantage, he must take something more than ordinary care to avoid injuring the rights of another. Thus, a person

occupying property is bound to take care that he deals with it so as not to injure persons being where they have a right to be (*Tarry v. Ashton*, L. R. 1 Q. B. 314).

Persons who take money for admission to public places, stands at races &c., are bound for many reasons to exercise great care (*Francis v. Cockerell*, L. R. 5 Q. B. 501). There is in every invitation a sort of implied warranty of safety, by which the person invited is put off his guard, and prevented from examining with caution the position in which the inviter has placed him.

A volunteer also, that is to say, a person voluntarily doing something although not paid for doing so, nor requested, is bound to take more than ordinary care, for he has chosen to intrude himself into the affairs of another (*Smith*).

#### NEGLECT OF DUTIES OF OWNERS AND OCCUPIERS OF REAL PROPERTY.

It is obvious that an improper use by one man of his land, *i. e.*, a user in excess of his rights, may cast an additional burden on to his neighbour, and thereby curtail the latter's legitimate enjoyment of his property, or cause him grave personal inconvenience, or even danger. Holt, C. J., laid down the strict principle of law—*sic utere tuo ut alienum non laedas* (every one must so use his own as not to do damage to another), and, according to this, whoever does any act, whether negligently or not, on or with his own property, whereby damage is done to the property of another, is held responsible for it (*Tennant v. Goldwin*, 2 Ld. Raym. 1092). The invasion of one's established right will in general *per se* constitute an injury, for which damages are recoverable. But where the above maxim is applied to landed property, it is subject to a certain modification, it being necessary for the plaintiff to show not

only that he has sustained damage, but that the defendant has caused it by going beyond what is necessary in order to enable him to have the natural use of his own land. If the plaintiff only shows that his own land is damaged by the defendant's using his land in the natural manner he cannot succeed (per Brett, L. J., in *Cumberland Iron and Steel Co. v. Kenyon*, 11 Ch. D. 787).

The following propositions are of wide application in connection with this subject, well established by the authorities.

(a). Where the owner of land uses his land for any purpose, for which it may in the *ordinary course* of enjoyment of land be used, he will not in the absence of negligence on his part be liable though damage result to his neighbour, in the ordinary enjoyment by the latter of his property: for it lies with the latter to protect himself from the operation of natural laws.

(b). But if the owner of land uses it for any purpose which from its character may be called *non-natural user*, such as for example, the introduction on to the land of something which in the natural condition of the land is not upon it, he does so *at his peril*, and is liable if sensible damage results to his neighbour's land or if the latter's legitimate enjoyment of his land is thereby materially curtailed (*Baird v. Williamson*, 15 C. B. N. S. 376; *Fletcher v. Rylands*, L. R. 3 H. L. 303).

(c). Where the owner's user is necessarily *noxious* in character, such, for instance, as the emitting of poisonous gas, he is clearly liable for injury resulting to a neighbour (*Robinson v. Kilvert*, 41 Ch. D. 88—*Garrett*).

(d). Where a duty arises to maintain property in any condition, there the person liable is bound not only to the discharge of the duty, but also to foresee and prevent the natural and probable consequence of deteriorated condition

in the works he is bound to maintain (*Firth v. B. Iron Co.*, 2 C. P. D. 254—*Bever*).

**Water**—In *Fletcher v. Rylands* (L. R. 3 H. L. 330) the defendant had constructed a reservoir on his land. Underneath the reservoir so constructed were certain disused mining shafts, which communicated with mines under the adjoining land, of which the plaintiffs were lessces. The defendant was not personally guilty of any negligence, and employed competent persons to construct the reservoir, but it was not made sufficiently strong, having regard to the existence of the disused shafts, to bear the pressure of water, which burst through the shafts and flooded the plaintiff's mine. Held, that the plaintiff was entitled to damages in respect of the damage caused thereby to his mine. Blackburn, J., said. "We think that the true rule of law is, that the person who, for his own purposes, brings on his land and collects and keeps there anything likely to do mischief if it escapes, must keep it in at his peril, and, if he does not do so, is *prima facie* answerable for all the damage which is the natural consequence of its escape.....And, upon authority, this, we think, is established to be the law whether the thing so brought be beast, or water, or filth, or stench." "If a man chooses to make any quantity of fish-ponds or mill-ponds, or artificial lakes or pleasure waters, or fountains or anything of that kind on his own land, he is at liberty to do so, provided that when he has finished doing so he does not increase the burden upon his neighbours" (*West C. S. Co. v. Kenyon*, L. R. 11 Ch. 782). The defendant in erecting a house put pipes down to convey water from the roof, but did not connect them with any drain. The water came through the pipes into the cellar of the house, collected there, and flowed from thence into the cellar of the adjoining house of the plaintiff, which was on a lower level; it was held that the case came within the principle of *Fletcher v. Rylands*, and that plaintiff was entitled to damages in respect of the injuries caused thereby (*Snow v. Whitehead*, 27 Ch. D. 588). The principle of *Fletcher v. Rylands* was held to apply to the escape of an electric current from the land of the party creating it (*National Telephone Co. v. Baker*, (1893) 2 Ch. 186). But as there was statutory authority, in this case, to use electrical power by a tramway company, the electrical disturbance caused in the wires of a neighbouring telephone company did not render the tramway company liable. The principle of *Rylands v. Fletcher*, applies to a proprietor who stores electricity on his land if it escapes therefrom and injures a person or the ordinary use of property. It does not apply to the case of injury done to a peculiar trade apparatus unnecessarily so constructed as to be affected by minute currents of the escaping force. In an action by a telegraph company for disturbances, in the working of their submarine cable, caused by an escape of electricity stored by the respondents for the working of their tramway



system; it was held, in regard to that section of the tramway which had not been constructed under statutory authority, that *Rylands v. Fletcher*, did not apply, because the disturbances only resulted when the cable was constructed without certain precautions, which had subsequently secured its immunity (*Eastern and South African Tel. Co. v. Cape Town Tram. Co.*, (1902) A. C. 381). If a man raises his own land artificially, and in consequence rain water falling on the land makes its way through his wall on to his neighbour's land, an action will lie in respect of the damage, if any, done thereby (*Hurdman v. N. E. Ry.*, 3 C. P. D. 168). If a man erects an artificial mound against the wall of his neighbour's house, and thereby causes damage and moisture to injure it, he is liable in an action for the damage resulting from it (*Broder v. Saillard*, 2 Ch. D. 692). If a man erects a cornice on his house which projects over his neighbour's land, by reason of which rain water flows into the latter's garden and causes damage, an action will lie (*Fay v. Prentice*, 1 C. B. 828).

It was held in a case that a cistern being an ordinary domestic apparatus of general use in houses, the owner was not liable for the damage ensuing in the event of its overflowing on to a neighbouring house, without any negligence being attributable to him (*Blake v. L. & H. P. Co.*, 3 T. L. R. 667). Where a landowner by working his mines caused a subsidence of his surface in consequence of which the rainfall was collected and passed by gravitation and percolation into an adjacent lower coal mine, it was held that the owner of the latter could sustain no action. For the right to work mines is a right of property, which when duly exercised begets no responsibility (*Wilson v. Wauldell*, 2 App. Cas. 95).

*Indian cases.*—The plaintiff sued for damages caused to his land by the bursting of a *bund* erected by the defendant, it was found that the *bund* had been made in a lawful manner, and the breach was owing to no fault of the defendant, so the defendant was held not to be liable (*Gooru Churn v. Ram Datta*, 2 W. R. 43; *Kadir Baksh v. Ram Nag*, 7 W. R. 448). The defendant closed up the outlets of a bank upon his own land, whereby the surface drainage water had immemorially flowed from the plaintiff's land, into and over the defendant's land, and so escaped. By reason of the closing of these outlets the water was unable to escape, and the plaintiff's land became flooded and the crops therein damaged. Held, that the defendant was liable for the damage caused (*Anarul Moye v. Hameedomissa*, Marsh, 85, 1 Hay. 152). A suit for damages will lie against a proprietor who pens back the water of a stream by erecting a bund upon his land, so as to inundate the land of his neighbour, without his license and consent (*Becharam v. Puhubnath*, 2 B. L. R. App. 53). A suit for damages, based on an allegation that defendant had neglected to drain his garden so as to prevent water from collecting there and injuring the adjoining property of

the plaintiff, is not maintainable as the owner of property is under no legal obligation to incur expense upon it for the benefit of his neighbours, where it has not been altered in character by his acts or with his permission in such a way as to expose them to any injury (*Balde Das v. Secretary of State*, P. R. 30 of 1883).

**Other things.**—The defendants planted on their own land, but so close to the boundary, as to project into the adjoining meadow in the occupation of the plaintiff, a yew tree, and the plaintiff's horse whilst feeding in the meadow ate of the portion of the tree which projected and died in consequence, it was held that the defendants were liable for the value of the horse (*Crowhurs v. Amersham Burial Board*, 4 Ex. D. 5). But if poisonous leaves do not extend to his neighbour's boundary, he is not liable; for his legal duty to his neighbour stops with his boundary, within which he is free to do or grow whatever he wishes, so long as the boundary is not overpassed. Thus, where the plaintiff's cattle ate of the branches of a yew tree no part of which extended over his field, and the defendants were under no liability to fence against the plaintiff's, it was held that they were not liable (*Ponting v. Noakes*, (1894) 2 Q. B. 281). The defendant's land adjoining the plaintiff's was fenced by a wire rope repaired by them. Through exposure the rope decayed and pieces of it fell on the grass on the plaintiff's land, whose cow in grazing swallowed one of the pieces and died in consequence. The defendant was held liable to the plaintiff for the loss of the cow (*Firth v. Bowling Iron Co.*, 3 C. P. D. 254). If a man collects game on his land to such an extent as to injure his neighbour's crops, an action will lie (*Farrer v. Nelson*, 15 Q. B. D. 258).

Where an occupier of land allowed thistles, which he had not brought on to his land, but which were its *natural* product, to seed, so that the seed was carried on to the adjoining land which was thereby injured; it was held that no action lay for the damage caused thereby (*Giles v. Walker*, 24 Q. B. D. 656).

**Exceptions.**—But a person is not liable if damage is done owing to the following causes—

1. *Vis major*, or act of God, that is, such an accident as human foresight could not reasonably be excepted to anticipate and prevent (*Nugent v. Smith*, L. R. 1 C. P. 441; *Nichols v. Marsland*, L. R. 10 Ex. 355; *Ram Lall v. Lil Dhari*, 3 Cal. 776). The occurrence must be overwhelming and not only unforeseen but incapable of being foreseen and absolutely incapable of being prevented or guarded against (*Vithaldas v. Municipal Commis. of Bombay*, 4 Bom. L. R.

914). In the first place the term act of God is strictly limited to those classes of inevitable accidents which are occasioned by the elementary forces of nature unconnected with the agency of man or other cause (*Nugent v. Smith, sup.*) e. g., lightning, earthquakes, storms, or floods. Secondly, if the particular natural disturbance is such that its occurrence might reasonably have been foreseen, the prevention of the injurious consequences flowing from it must have been practically impossible; it is not essential that it should have been physically impossible to prevent them, it will be sufficient if the precautions necessary for that purpose would under the circumstances of the case have been unreasonable (*Nichols v. Marsland, sup.*). Thirdly, if the means necessary to ward off the effects of the particular act of nature would not have been unreasonable, then its occurrence must have been so improbable that it could not reasonably have been foreseen (*C. & L.*, 389). The act of God is no defence except in case where the defendant can show that the damage would equally have happened if he had done his duty, and care must be taken to see whether the accident is due to an act of God or to a contemporaneous act of the defendant. If a storm, though unusual, is not unprecedented, it does not come within the category of acts of God. If the defendant can show that he has provided for every probable contingency he is not liable further, but may excuse himself for not providing for something which is contrary to all previous experience (*Smith*). But the mere fact that a phenomenon has happened once, when it does not carry with it or import any probability of recurrence, when, in other words, it does not imply any law from which its recurrence can be inferred, does not place that phenomenon out of the operation of the rule of law with regard to the act of God. In order that the phenomenon should fall within the rule, it is not necessary that

it should be unique, that it should happen for the first time. It is enough that it is extraordinary, and such as could not reasonably have been anticipated (per Fry, J., in *Nitro-Phosphate Manure Co. v. London & St. K. D. Co.*, L. R. 9 Ch. 515).

2. Wrongful act of third party (*Box v. Jubb*, 4 Ex. D. 76).

3. Plaintiff's own default.

4. Artificial work maintained for the common benefit of plaintiff and defendant (*Carstairs v. Taylor*, L. R. 6 Ex. 217).

5. When it is the consequence of an act done for public purposes in the discharge of a public duty under the express authority of a statute (*Madras Railway Company v. Zemindar of Carvetinagram*, L. R. 1 I. A. 364).

**Exception 1.**—The defendant had a series of artificial lakes on his land, in the construction or maintenance of which there had been no negligence. Owing to a most unusual fall of rain, so great that it could not have been reasonably anticipated, some of the reservoirs burst and carried away four country bridges. Held, that the defendant was not liable, inasmuch as the water escaped by the act of God. "The present case is distinguishable from that of *Fletcher v. Rylands*, in this that it is not the act of the defendant in keeping this reservoir, an act in itself lawful, which alone leads to the escape of the water, and so renders wrongful that which but for such escape would have been lawful. It is the supervening *vis major* of the water in the reservoir (which in itself would have been innocuous), that causes a disaster" (per Mellish, L. J., in *Nichols v. Marsland*, L. R. 10 Ex. 255). A water-company whose apparatus was constructed with reasonable care, and to withstand ordinary frosts, was held not to be liable for the bursting of the pipe by an extraordinary severe frost (*Blythe v. Birmingham W. W. Co.*, 25 L. J. Ex. 212). Where the defendant's line was displaced by an extraordinary flood, and by such misplacement injury was done to the plaintiff, it was held that no action could be maintained against the defendants (*Withers v. The North Kent R. Co.*, 27 L. J. Ex. 417).

*Indian cases.*—The plaintiff had sued the defendant without averring negligence, because a reservoir, which was the property of the latter, had burst and the flood caused by its bursting had destroyed the permanent way in places and done other damage. The Judicial Committee held that the

defendant in the case before them possessed, as regards this reservoir, powers analogous to statutory powers and could not, therefore, be held liable unless negligence were proved (*Madras Ry. v. Zemindar of Carvetinagram*, L. R. 1 I. A. 361). Where a defendant shows a prescriptive right to maintain a *bund*, and uses all reasonable and proper precautions for its safety, he cannot be made liable for damage caused by the escape or overflow of water on to the lands of others and the consequent injury of the crops thereon, if the escape or overflow be caused by the act of God or *vis major* (*Ram Lall v. Lill Dhary*, 3 Cal. 776; *Gooroo Churn v. Ram Dutt*, 2 W. R. 43).

**Exception 2.**—Where the reservoir of the defendant was caused to overflow by a third party sending a great quantity of water down the drain which supplied it, and damage was done to the plaintiff, it was held that the defendant was not liable. "It seems to me to be immaterial where this is called a *vis major* or the unlawful act of a stranger; it is sufficient to say that the defendant had no means of preventing the occurrence" (per Kelly, C. B., in *Box v. Jubb*, 4 Ex. D. 77).

**Exception 4.**—The defendant was the plaintiff's landlord, and was living on the floor above him. Some rats gnawed a rain-water box maintained by the defendant for the benefit both of himself and the plaintiff, and the water running through injured plaintiff's goods below, it was held that no action lay (*Carstairs v. Taylor*, L. R. 6 Ex. 217). The plaintiffs were tenants of the ground floor and basement of a house of which the defendant was owner, the upper floors being let out to separate tenants. The different floors were supplied with water from a cistern at the top of the house. The branch service pipe supplying the first floor burst, and the basement was flooded. Held, that the defendant was not liable (*Anderson v. Oppenheimer*, 5 Q. B. D. 602). The plaintiff occupied the ground floor and the defendants the second floor of the same house. In the defendants' premises was a water closet, to which they alone had access, and which closet was put up by the landlord before the plaintiff came into occupation. The waste pipe of the closet, without any negligence on the part of the defendants, got stopped up with paper, which caused the water in the pan to overflow and so to flood the plaintiff's premises. The defendants were held not liable on the above ground. A person who takes a floor of a house takes it subject to the ordinary risks arising from the use of the rest of the house as it stands; and one who merely continues to use the rest of the house as it stands, and in the ordinary manner, is not liable for consequences (*Ross v. Fedden*, L. R. 7 Q. B. 661). The defendant was the owner of premises to which water was laid on, and he had a cistern on the fourth floor. The plaintiff became tenant of the ground floor, and took his supply of water from the defendant. A leakage from the cistern having been noticed by the plaintiff, he informed the defendant, who instructed a competent plumber to remedy it. In consequence

of the negligence of the plumber an overflow occurred, which damaged the plaintiff's goods. Held, that the defendant was not liable, since the plaintiff had assented to the water being on the premises, and therefore the defendant, by instructing a competent plumber to remedy the leakage, had discharged his duty to the plaintiff (*Blake v. Wolf*, (1899) 2 Q. B. 426).

*Leading cases.*—**Rylands v. Fletcher**; **Nichols v. Marsland**.

“The care of a prudent man,” required from householders, owners, occupiers of land, and owners and occupiers of structures (which include houses, ships, carriages, engines, machinery, and the like), differs according as the persons, in regard to whom it has to be exercised. These persons fall into following categories :—

1. Those who enter on property without permission (*e. g.*, trespassers).

2. Persons coming by permission, solely of their own choice, and on their own business (*e. g.*, licensees, volunteers, and guests).

3. Persons induced to come on business and interests of the occupants alone, or of themselves and the occupants (*e. g.*, customers).

4. Persons lawfully passing by.

1. Persons entering on property, **without permission**, are distinguished into two classes :

(*a*). Those entering on the property intentionally, but *without* consciousness of wrong-doing, as where the boundary is ill-defined and they being lawfully on the adjoining premises stray unconsciously across the boundary.

(*b*). Intentional trespassers *with* a consciousness of wrong doing, and negligent trespassers.

The care required in regard to class (*a*) is to secure persons so straying upon the premises from damage arising from the condition of the premises, or from anything done upon them in the immediate vicinity of the road or place from which they have strayed.

A, a builder, left the area of an unfinished house open and unfenced against the road on which it abutted. B, lawfully walking at night along the thoroughfare, passing close by the premises fell into the area. A was held to have failed to exercise the care of a prudent man (*Barnes v. Ward*, 9 C. B. 392). A footpath had been made by A & Co. (railway contractors), connecting a line they were constructing with an existing path, but they left the new path undistinguished from the old one, which they should have fenced off at the point of divergence. B coming along at night, being unable to discover which was the right path to use, took the old one, and was seriously hurt by falling over an unfinished bridge. A & Co. were held to have failed to exercise the care of a prudent person (*Hurst v. Taylor*, 14 Q. B. D. 18).

“The care of a prudent man” required in regard to class (b) is to avoid endangering the safety of such persons by concealed dangers in the nature of a trap, or such as would be likely to punish intruders in a cruel manner, and one altogether disproportioned to the injury done by the mere trespass (*Innes*).

A has a spring-gun in his premises which would shoot persons trespassing. B's dog having strayed off the road, B goes in search of it into A's premises without asking or obtaining A's consent. The spring-gun goes off and seriously wounds B. Here A fails to exercise the care of a prudent man in respect to trespassers, whether negligent or intentional (*Bird v. Holbrook*, 4 Bing. 625). On the other hand, where the plaintiff had notice of the danger, the defendant was held not to be liable (*Ilott v. Wilkes*, 3 B. & A. 304). If a trespasser tumbles into a hole or unguarded pit, he has no remedy for an injury suffered thereby, as the hurt is in such a case caused by his own carelessness and misconduct (*Bolch v. Smith*, 7 H. & N. 736). A was passing along a public footway, and straying from the path fell into an unfenced reservoir in B's premises, and sustained harm. Here A acted as he did through negligence, as the reservoir was at some distance from the footway. The reservoir, too, was made and maintained for proper purposes, and not for the purpose of punishing intruders. B did not, in this case, fail to exercise, as regards A the care of a prudent man (*Hardcastle v. S. Yorkshire Ry.*, 4 H. & N. 74).

2. Towards persons coming by permission, but solely of their own choice, and on their business, and guests, “the care of a prudent man,” on the part of one who is a householder or other description of person mentioned above, is—

1. To caution those using the land against any known insecurity (hidden danger) which is of a not readily discoverable character (*Gantret v. Eagerton*, L. R. 2 C. P. 371).

2. Not to alter the character of the land—

(a). By placing on it dangerous obstructions (*Corby v. Hill*, 4 C. B. N. S. 556).

(b). By affecting the condition of the property whereby the danger is increased without notice (*Gallagher v. Humphrey*, 6 L. T. N. S. 684).

3. To use due diligence, *i. e.*, not to be guilty of negligence in any work that is being carried on upon the premises, and by default in which injury might arise to the licensee (*White v. France*, 2 C. P. D. 308—*Beven*).

A gave permission to B to cross his yard, which was traversed by several routes. In a part of the yard was a hole which A usually kept covered. One night A uncovered it, and B, who was unprepared for its being uncovered, took the same route as usual, and sustained damage from falling into the hole. A in this case had not exercised the care required (*Blythe v. Tapham*, 1 Roll. Abr. 88; *Gantret v. Eagerton*, L. R. 2 C. P. 371). There was a private way across A's premises which B used with A's consent. C had also been permitted to deposit slate and other materials on the same road at night. B's horse driven along the road at night, was injured by falling over the materials. A was held answerable to B. Had B been a trespasser there would have been contributory negligence on his part, but he was lawfully on the road and without negligence, and A was bound to take the care of a prudent man that he did not meet with harm, by warning him of what was a hidden danger in the nature of a trap (*Corby v. Hill*, 4 C. B. N. S. 556. See, *Evans v. The Trustees of the Port of Bombay*, 11 Bom. 329). A was defendant's guest. When he was leaving the house a loose pane of glass fell from the door, as he was pushing it open, and cut him. It was known that the glass was in a dangerous state. It was held that there was no want of due care on the part of the defendant (*Southcote v. Stanley*, 1 H. & N. 247). The plaintiff was a little boy of four, who one day accompanied his sister to the defendant's house, where she was going on business. The girl went up the defendant's steps all right, but the little boy tumbled through a gap in some railings out of repair into the area below. It was



held that the action could not be maintained, as the little boy's position could be placed no higher than that he was there lawfully, and was not a trespasser; and, that being so, the only duty on the part of the defendant towards him was to take care that there was *no concealed danger* and of this there was no evidence (*Burchell v. Hickissson*, 50 L. J. C. P. 101).

3 In regard to persons induced to come on the business and interests of the occupants alone or of themselves and the occupants, "the care of prudent man" is the care required to keep the premises in a reasonably safe condition to secure such persons from harm from anything about the premises, hidden or open to observation, making it dangerous for such persons, using reasonable care, to be upon the premises for the purposes for which they are induced to come (*Innes—Carleton v. F. I. Co.*, 99 Mass. 216; *Chapman v. Rothwell*, E. B. & E. 168). A person who goes upon premises which concerns the occupier and upon his invitation, express or implied, is entitled to expect that the occupier shall use reasonable care to prevent damage from unusual danger which he knows, or ought to know (per Willes, J., in *Indermaur v. Dames*, L. R. 1 C. P. 274). Visitors on business which concerns the occupier of premises may maintain an action for any injury caused by the unsafe state of the premises (*Ivay v. Hedges*, 9 Q. B. D. 80).

The inducement may be either by express or implied invitation. The expression "persons coming by inducement" includes customers, persons calling for orders, persons doing work about the structure, and others; but does not include guests.

A, a journey-man gasfitter, was testing some new burners in B's sugar-factory. On the premises was an unfenced shaft, used by B in working hours for raising and lowering sugar. Without want of reasonable care on his part, A, while on the upper floor, fell through this shaft. B had, in this case, not exercised the care of a prudent man towards A, who was induced to come on the business and interest of B. As A was not accus-

tomed to the premises B should have had the shaft fenced off, or have called A's attention to the danger in such a way as to impress upon him the necessity of care to avoid it (*Indermaur v. Dames*, L. R. 1 C. P. 274). The plaintiff, a licensed waterman, having complained to the person in charge that a barge of the defendants was being navigated unlawfully, was referred to the defendants' foreman. While seeking the foreman he was injured by the falling of a bale of goods so placed as to be dangerous, and yet to give no warning of the danger; it was held the defendants were liable (*White v. France*, 2 C. P. D. 308). Dockowners who erected a staging round a vessel in their dock for the purpose of repairing it, were responsible for injuries occasioned to a workman employed by the shipowners in repairing the vessel. The staging had been handed over to the shipowners and was in their control. But it was considered that persons coming on business to the vessel in the dock of the defendants came on business in which the defendants were interested, and that the persons so coming must be considered as *invited* by the dockowner (*Heaven v. Pender*, 11 Q. B. D. 503). Where the plaintiff was injured while going over a gangway which the defendants had provided for the passage from their dock to vessel lying adjacent, and the gangway was in an insecure position to the knowledge of the defendants, it was held that the defendants were liable as the plaintiff went on board a ship in the dock at the invitation of one of the ship's officers (*Smith v. L. & St. K. D. Co.*, 3 C. P. D. 326). Defendant chartered for a voyage a vessel which was at the time at sea and in ballast. The charterparty declared that she was in every way fit for the service. The defendant, after she was put at his disposal in dock, contracted with a stevedore to load it. The stevedore engaged the plaintiff amongst others to carry out the work. The plaintiff, in the course of this work, had to descend a ladder leading into the hold. It came adrift, and the plaintiff fell, sustaining injuries. Held, that the defendant was liable as it was his duty to make some inspection of the vessel before allowing the stevedore and his men to go on board her (*Marney v. Scott*, (1899) 1 Q. B. 986).

In order to succeed in an action of this kind, the plaintiff must prove a duty on the part of the defendant towards him to keep the premises in a reasonably secure condition, and, further, that the injury was the direct result of a breach by the defendant of such duty (*Smith v. L. & St. K. D. Co.*, *sup.*)

*Leading case.*—**Indermaur v. Dames.**

4. In regard to persons lawfully passing by the premises, the care required may be expressed in the same way as that required in the case of persons intentionally entering

upon the premises without consciousness of wrong-doing, it extends to guarding against what may happen just *beyond* the premises, on the road, or other place, where a person passing by may lawfully be, instead of just within the premises (*Innes*).

If a person maintains a lamp projecting over a highway for his own purposes, it is his duty to maintain it so as not to be dangerous to the passengers; and if it causes injury owing to want of repair, it is no answer on his part that he had employed a competent person to repair it (*Tarry v. Ashton*, 1 Q. B. D. 314). See, *Kearney v. L. & S. C. Ry.*—brick case—L. R. 5 Q. B. 411; *Byrne v. Boadle*—barrel of flour case—2 H. & C. 272; *Mullen v. St. John*—housing falling—57 N. Y. 567; *Briggs v. Oliver*—packing case falling—35 L. J. Ex. 163; *Scott v. London Docks Co.*—bags of sugar falling—3 H. & C. 596; *Silvester v. Marriot*, 59 L. T. 61; *Hawkins v. Shearer*, 55 L. J. Q. B. 284—unfenced quarry in occupation of A, surrounded by field in occupation of B. Danger to B's cattle, and death of one of them by falling into the quarry.

#### LEVEL CROSSING.

Where a railway company is bound by statute to shut the gates of a level crossing while a train is approaching, and omits to do so, it invites persons to cross the line, and thereby puts them off their guard, and is liable for the injuries which ensue (*N. E. Ry. v. Wanless*, L. R. 7 H. L. 12). It is a matter of common sense that a person who is crossing a railway line upon a level should look before he crosses; but, possibly, if there were a statutory duty upon the railway to keep gates or guards, the defendants might mislead the plaintiff into a feeling of security, and his not looking, when the gates were open or unguarded, might not be evidence of negligence (*Stapley v. L. B. & S. C. Ry.*, L. R. 1 Ex. 21). The plaintiff must allege and prove, not merely that the company was negligent, but that its negligence caused or materially contributed to the injury (*Wakelin v. L. & S. Ry.*, 12 App. Cas. 41).

Smith's death took place at a railway crossing on the defendants' railway. There was a cottage on the down side of the crossing occupied by a

man named Judges, whose duty it was to open and shut the gates for the purpose of allowing carriage traffic to pass. It was also his duty on hearing a gong sound, which announced the approach of a train, to go out and signal to the driver if the line was clear. The only way of getting to Judges' cottage was across the line. Smith, who lived on the opposite side of the line to that on which the cottage stood, on the night of the accident, came to the cottage to inquire whether his wife was there. On being told that she was not, he went out again. Within a very short time after he had left, the whistle of the uptrain was heard. Judges did not go out to signal the train and the engine driver did not slow down. The latter, however, whistled 200 yards before he came to the crossing, he was travelling at the rate of 35 to 40 miles an hour, and he ran over the deceased at the crossing. The negligence alleged was the omission of Judges to come out to signal the train. The company was held liable (*Smith v. S. E. Ry.*, (1896) 1 Q. B. 178). S attempted to cross a railway line at night at a spot where persons were in the habit of crossing with the acquiescence of the company. At the time he attempted to cross there was a train standing still on the up line in such a position as to prevent a person on the line behind it from seeing anything approaching on the down line. S came from behind the train on the upline, and, on crossing on to the down line, was struck by an express train and killed. Held, that the company was liable for negligence (*Dublin Wic. & Wex. Ry. v. Slattery*, 8 App. Cas. 1155; *Rogers v. Rhymney Ry.*, 25 L. T. 879; *Clarke v. Midland Ry.*, 43 L. T. 381).

The plaintiff, a medical doctor, whose time was of pecuniary value, was, while driving along a public highway, detained for twenty minutes at a level crossing by the unreasonable and negligent delay of the servants of the defendant Railway company in opening the gates at the crossing. Held, that the defendants were liable in damages to the plaintiff for such delay (*Boyd v. G. N. Ry.*, (1895) 2 I. R. 555).

#### INVITATION TO ALIGHT.

The announcement of the name of a station, coincident with the stoppage of the train thereat, and its coming to a complete standstill is, in the absence of a warning to the passengers to keep their seats, an invitation to alight, at all events after such a time has elapsed that the passenger may reasonably infer that it is intended he should get out, if he professes to alight at that particular station. An invitation to alight on the stopping of a train without any warning of danger to a passenger, who is so circumstanced as not to be able to alight without danger, such danger

not being visible or apparent, amounts to negligence on the part of the railway administration. Reasonable means of alighting from vehicles must also be provided by a carrier, and he is responsible for any neglect of this duty (*Macpherson*).

Where a train, in the last carriage of which the plaintiff was, arrived at the terminus but drew up short of the buffers, and the portion of the platform opposite the plaintiff's carriage was bevelled off, leaving a space of 18 inches between it and the carriage, and, the guard having opened the door without giving any warning of the state of matters, the plaintiff fell in getting out, it was held that the conduct of the guard amounted to an intimation that the plaintiff could alight safely, and that the latter was entitled to recover (*Præger v. B & E. Ry.* 24 L. T. N. S. 105; *London T. & S. Ry. v. Glascock*, 19 T. L. R. 305). The mere stopping of a train and calling out the name of a station is not, in all cases, evidence of an invitation to alight. The plaintiff was a passenger by the defendants' railway to Bromley station. As the train arrived there she heard "Bromley, Bromley" called out several times. The train was brought to a standstill, but not before it had partly overshot the platform. As the plaintiff was in the act of getting out, and when her foot was on the step of a carriage, the train was put back with a jerk, and she fell on the platform. The period occupied by the stoppage of a train was little more, than momentary, and the plaintiff knew the station well; it was held that there was no evidence of negligence on the part of the defendants (*Lewis v. L. C. & D. Ry.*, 43 L. J. Q. B. 8).

#### TRAINS OVERSHOOTING THE PLATFORM.

Although the fact of a train or some of the foremost carriages attached to it having overshot the platform is *prima facie* proof of negligence or want of skill on the part of the railway servants, it does not relieve the passengers in such carriages from the obligation of taking reasonable and ordinary care for their own safety by satisfying themselves that there is a platform or other safe place for them to stand upon before they alight from the carriages, and to maintain an action in such cases it is incumbent upon the plaintiff to prove that he did exercise that degree of care, and that there was no contributory negligence on his part (*Macpherson*). It has been held that a railway company is

not bound to have a platform as long as any of its trains, but is only bound to do what is reasonable in that respect (*Owen v. G. W. Ry.*, 46 L. J. Q. B. 486).

Upon a train on the defendants' line of railway arriving at a station, the two or three foremost carriages, in one of which the plaintiff was a passenger, overshot the platform at the station, and where the carriages stopped, the line of railway was on an embankment some height above a road-way. The night was rather dark, and there was no light in the carriage, and no stationary light on the platform; nor was there any fence on the top of the embankment between it and the road-way beneath. When the train stopped, the plaintiff, knowing that the carriage had overshot the platform and without waiting to see whether it would be backed, got out of the carriage in the dark, and in doing so missed his footing and fell forward over the embankment into the road-way beneath. It was held that on the facts stated the railway company were not guilty of negligence, and were not liable for the injuries sustained by the plaintiff (*Harold v. G. W. Ry.*, 14 L. T. 440).

*Indian case.*—The plaintiff was a passenger travelling on the defendants' railway, and received severe injuries from a fall which he experienced in stepping upon the platform when the train stopped. Held, that the railway company was guilty of negligence in not keeping the station properly lighted, in allowing the train to overshoot the station, and in not warning the plaintiff against alighting; also that the injuries sustained by the plaintiff were caused by the negligence in question, and that the plaintiff did not by his own want of care contribute to the accident (*Woodhouse v. C. & S. E. Ry.*, 9 W. R. 73).

## 2. *Where a person professes to have greater skill.*

Where it is evident that persons hold themselves out to be persons of *skill*, they are bound to exercise *skill*. It is not enough that the defendants have acted *bona fide* and to the best of their skill and judgment. They are bound to conduct themselves in a skilful manner. Of this class are—

- |                                                                    |                             |
|--------------------------------------------------------------------|-----------------------------|
| 1. Corporations who undertake the performance of difficult duties. | 4. Innkeepers.              |
| 2. Directors of companies.                                         | 5. Physicians and Surgeons. |
| 3. Carriers.                                                       | 6. Solicitors.              |
|                                                                    | 7. Bankers.                 |

### I. CORPORATIONS.

Where a person is entrusted by a statute or charter, or prescription, with the execution of certain duties, the law

demands of him that he should use something more than ordinary care in the performance of his duties. In most cases, it is very reasonable that this should be so, for the person so interested has received from the legislature some benefit which has induced him to undertake the burden of the duty ; and even where this may not be so, where a statute enjoins a person to do a thing, it would be absurd to suppose that the thing may be done any how, and yet the person not be liable, and it would be very reasonable to suppose that the law intends that the thing shall be done with more than ordinary care.

In the execution of a duty imposed by a statute, a person is bound to use his best skill and diligence (*Sutton v. Clarke*, 6 Taunt. 29 ; *Mersey Docks v. Gibbs*, L. R. 1 H. L. 3). He is bound not only to act *bona fide*, and to the best of his skill and judgment, but he is bound to conduct himself in a skilful manner, and to do all that any skilful person could reasonably be required to do (per Bayley, J., in *Jones v. Bird*, 5 B. & A. 837). And it seems clear that he cannot excuse himself, as in the case of a person failing to perform a non-statutory duty, by saying that he employed a competent contractor (*Gray v. Pullen*, 6 B. & S. 973 ; *Hole v. Sittingbourne Ry.*, 6 H. & N. 488).

Where the duty is discretionary merely, the corporation are not liable for omitting to do what they are not bound to do ; but if they undertake to perform a duty, or to do a work which they are not bound to do, they must exercise ordinary care.

It has been held, after many conflicting decisions, and is now settled law, that corporations are liable for negligence, whether they derive any ultimate pecuniary benefit or not from the performance of the duty imposed upon them (*Mersey Docks v. Gibbs*, L. R. 1 H. L. 93).

## 2. DIRECTORS OF COMPANIES.

Directors of a company ought to show more than ordinary care towards the share-holders, for they are persons holding themselves out as capable of directing complicated affairs and inviting persons to trust their money to the company which they profess to direct. They are unlike trustees, who undertake irksome duties for no pay or advantage, for they are always either paid or deriving some benefit or advantage from their position. They must show diligence which good men of business are accustomed to show.

Where the defendant company had been guilty of a wrongful act of omission in not registering the plaintiff's name in their books, and also of a wrongful act of commission in declaring shares to be forfeited, it was held that both acts were the proper subject of an action (*Catchpole v. Ambergate Ry.*, 1 E. & R. 111).

## 3. CARRIERS.

1. Carriers of goods. 2. Carriers of passengers.

1. *Carriers of goods.*

A common carrier has been defined to be one who undertakes for hire or reward to transport the goods of such as choose to employ him from place to place (*Alexander v. Green*, 7 Hill 544; *Sheldon v. Robinson*, 7 H. & N. 157; 163).

Common carriers are generally of two descriptions.—

- (1). Carriers by land; and (2). Carriers by water.

Of the former description are the proprietors of stage-waggon (omnibuses), stage-coaches, and railroad cars, which ply between different places and carry goods for hire (*Coggs v. Bernard*, 2 Ld. Raym. 909). So are truckmen, waggoners, teammasters, cartmen, and porters, who undertake to carry goods for hire, as a common employment, from one town to another (*Gisbourne v. Hurts*, 1 Salk. 249), or from one part of a town or city to another.



Of the latter description are the owners and masters of ships whether they are regular packet ships, or carrying-smacks, or coasting-ships, or other ships carrying general freight. So are the owners and masters of steam-boats engaged in the transportation of goods for persons generally for hire (*Jones*).

Duties.—A common carrier is bound—

1. To receive and carry all goods offered for transportation by any person, whatsoever, upon receiving a suitable hire. If he will not carry goods for a reasonable compensation, upon a tender of it, and refuses the goods, he will be liable to an action, unless there is a reasonable ground for the refusal.

2. To take the utmost care of goods from the moment of receiving them.

3. To obey the directions of the owner in respect to them (*Streckter v. Horlock*, 1 Bing. 34).

4. To carry them safely to the proper place of destination (*Kemp v. Contry*, 11 Johns. 137; *Brind v. Dale*, 8 C. & P. 207).

5. To make a right delivery of them there, according to the usage of trade, or the course of business.

6. To be responsible for any loss or damage which may happen from any defect in the vehicles.

If the carriage is to be by *water*, carriers are bound to provide a ship tight, staunch and strong, and suitably equipped for the voyage, with proper officers and a proper crew; to proceed without deviation to the proper port; to expose the goods to no improper hazards; to guard against all injuries incident to the property, by reasonable care in preserving the goods from the effects of storms or bad air, of leakage, and of embezzlements (*Abbott*).

In short, every carrier is bound to use all the diligence which prudent and cautious men, in the like business,

usually employ for the safety and preservation of the property confided to their charge.

**Liabilities.**—A common carrier is responsible for all losses, except those occasioned by the act of God or the King's enemies. He is not only responsible for his own acts but also for the acts of his servants and of other persons in his employment (*Cavenagh v. Such*, 1 Price 328). He is also responsible for the wrongful acts of mere strangers, notwithstanding they are not personally, or by their servants, guilty of any negligence or omission of duty.

But the carrier may limit his liability by means of special contract or conditions (*Wyld v. Pickford*, 8 M. & W. 443; *Price & Co. v. Union Lighterage Co.*, (1903), 1 K. B. 750: See Carrier's Act III of 1865; Contract Act IX of 1872, Bailment; Railway Act IX of 1890).

**Termination of the risk.**—As soon as the goods have arrived at their proper place of destination, and are deposited there, and no further duty remains to be done by the carrier, his responsibility as such ceases. He then becomes, as to the goods, a mere warehouseman.

## 2. *Carriers of passengers.*

Carriers of passengers are not, like carriers of goods, insurers; and, accordingly, before one of their victims can recover damages, he must prove a breach of duty. Their duty is to take due care (including in that term the use of skill and foresight) to carry the passenger safely, and is not a warranty that the carriage in which he travels shall be in all respects fit for its purpose (*Readhead v. Midland Ry.*, L. R. 4 Q. B. 379). They are of two descriptions—

1. Passenger carriers on land. 2. Passenger carriers by water.

1. *Passenger carriers on land.*

The first and most general obligation on their part is to carry passengers whenever they offer themselves, and are ready to pay for their transportation. They are not at liberty to refuse a passenger, if they have sufficient room and accommodation (*Bretherton v. Wood*, 3 B. & B. 54).

**Duties.**—The proprietors are bound to provide road-worthy vehicles, suitable for the safe transportation of the passengers. They are bound to provide careful drivers, of reasonable skill and good habits, for the journey; who must be well acquainted with the road they undertake to drive.

**Liabilities.**—These naturally flow from their duties. It has been held that passenger-carriers bind themselves to carry safely those whom they take into their coaches, as far as human care and foresight will go, *i. e.*, for the utmost care and diligence of very cautious persons; and, of course, they are responsible for any, even the slightest neglect (*Christie v. Griggs*, 2 Camp. 79). They are liable for any accident which may arise from any latent defect in the vehicle which might be discovered by a minute examination (*Sharp v. Gray*, 9 Bing. 447). If any danger or injury occurs to the passengers they will be responsible to the full extent thereof (*Ashton v. Heaven*, 2 Esp. 533). Railway companies are bound to use proper care and skill in carrying their passengers; they are not liable as common carriers of passengers independently of negligence (*East Indian Ry. v. Kalidas Mukerjee*, (1901) A. C. 396; 3 Bom. L. R. 293; 28 Cal. 401). But, passenger carriers, not being insurers, are not responsible for accidents, where all reasonable skill and diligence have been employed.

In regard to their liability for the baggage of passengers they stand upon the ordinary footing of common carriers. Baggage means such articles of necessity or per-

sonal convenience as are usually carried by passengers for their personal use, and not merchandise or other valuables, although carried in the trunks of passengers, which are not designed for any such use, but for other purpose, such as a sale and the like (*Pardee v. Drew*, 25 Wend. 459). If carriers of passengers carry goods also for hire, they are in respect to such goods to be deemed common carriers and responsible accordingly. But in all such cases, it must be clear that the proprietors hold themselves out as persons exercising a public employment, and as being ready to carry goods for hire for persons in general.

**Defences.**—In reply to a suit for damages for injury caused a carrier may put forward any of the following pleas :—(1) A general plea of not guilty of the alleged negligence, unskilfulness, wrongful conduct, or default complained of; or (2) that the plaintiff by his own negligence or misconduct contributed to cause the injury sustained; or (3) that the injury was the result of the wrongful act of a third party; or (4) that the plaintiff was a trespasser at the time he received the injury, or that he had been guilty of wrong, fraud or misconduct towards the defendant, such as to disentitle him to redress; or (5) that the accident in which the plaintiff sustained the injury was occasioned by the act of God, or of the enemies of the Queen; or (6) that it was inevitable and beyond defendant's control (*Macpherson*).

**Defendant liable.**—A man sent a cow by train from Doncaster to Sheffield. When it got to Sheffield a porter rather unadvisedly released it; it ran into a tunnel and was killed. The restiveness and stupidity of the cow was undoubtedly the real cause of its death, but the porter ought not to have been in such a hurry to let it out; and on this latter ground the company were held responsible (*Gill v. M. S. & L. Ry.*, L. R. 8 Q. B. 186).

**Defendant not liable.**—Where an accident was caused by a latent defect in a vehicle, which it was impossible, with the exercise of all due care, caution, and skill to have discovered; it was held that the railway company was not liable (*Readhead v. Midland Ry.*, L. R. 4 Q. B. 379). Plaintiff bought a pole

for his carriage from the defendant, a coach builder. The pole broke in use, and the horses, becoming frightened, were injured. The jury found that the pole was not reasonably fit for the carriage, but that defendant was not negligent. Held, that the defendant was liable (*Randall v. Newson*, 2 Q. B. D. 102). The plaintiff had a bullock which he wanted to send by railway from a small station near Monmouth to Northampton. The beast was duly loaded to the plaintiff's satisfaction in one of the defendant company's trucks, but on the journey it managed to escape, and got killed on the line. The company were held not liable, for the disaster was due to the inherent vice of the beast (*Blower v. G. W. Ry.*, L. R. 7 C. P. 655). Where the plaintiff employed the defendant to remove her goods in a cart, and with the consent of the defendant's carman rode upon the cart, which broke down, it was held that she was not entitled to recover for the personal injury to herself, for there was no contract to carry the plaintiff safely, but only her goods, and by getting into the cart she became a trespasser (*Lygo v. Newbold*, 23 L. J. Ex. 108).

*Indian cases.*—The plaintiff entered a carriage on the defendants' railway at Surat with the purpose of proceeding to Bombay. By an oversight, without any fraudulent intent, he omitted to procure a ticket at Surat. On arriving at Nowsari, he applied to the station-master for a ticket to Bombay, but was refused; he was, however, allowed by the defendants' servants to proceed in the same train to Bulsar, where he again applied for a ticket and was again refused, but was directed by the defendants' servants to get into the train and not leave it again. At Dhandu he again got out and applied for a ticket to the station-master. During a discussion between the plaintiff's master and the station-master, the plaintiff at the direction of his master, re-entered the train. Ultimately the station-master refused to issue a ticket, and ordered the plaintiff to get out of the train; and, on his not complying with the order, sent a sepoy, who forcibly removed the plaintiff from the carriage. In an action to recover damages for the forcible and illegal removal and detention of the plaintiff, it was held that the absence of a fraudulent intention did not make the entry into the carriage less unlawful, and consequently the plaintiff started from Surat as a trespasser; that the conduct of the railway officials at the stations between Surat and Dhandu, if it amounted at all to leave and license to the plaintiff to proceed without a ticket, could only operate as such until the train stopped at the next station; and that there was no legal obligation on the station-master to issue a ticket to the plaintiff to enable him to proceed from Dhandu (*Pratab Daji v. B. B. & C. I. Ry.*, 1 Bom. 52). Where a passenger was killed in a railway carriage by an explosive illegally introduced into it; it was held that the railway company was not liable in damages unless guilty of negligence in permitting the fireworks to be brought into the carriage. As it was not the duty of the company to search every parcel carried by a passenger, the onus was on the plaintiff to shew that the parcels containing the fireworks suggested danger (*East Indian Ry. v. Kalidas*, *sup.*).

*Leading case.*—**Readhead v. Midland Ry.**

2. *Passenger carriers by water.*

The law imposes upon carriers of passengers in ships and by inland navigation the same general obligations and responsibility with respect to the safety of passengers as it does upon carriers by land : and except, where particular Acts, as the Merchant Shipping Act, interfere, they are bound by the same rule, there being no distinction between them (*In re Trent Navigation Co.*, 3 Esp. 132).

## 4. INNKEEPERS.

An innkeeper may be defined to be the keeper of a common inn for the lodging and entertainment of travellers and passengers, their horses and attendants, for a reasonable compensation (*Bacon*). It must be a common inn, or *diversorium*, that is, an inn kept for travellers generally and not merely for a short season of the year, and for select persons who are lodgers (*Calye's case*, 8 Co. 32). A person who keeps a mere private boarding or lodging house is in no just sense an innkeeper (*Parkhurst v. Foster*, 1 Salk. 387).

**Duties.**—An innkeeper is bound to take in all travellers and wayfaring persons, and to entertain them, if he can accommodate them, for a reasonable compensation ; and he must guard their goods with proper diligence (*Thompson v. Lacy*, 3 B. & A. 283). If an innkeeper improperly refuses to receive or provide for a guest he is liable to be indicted therefor (*R. v. Evans*, 7 C. & P. 213). But if all the rooms of an inn be full, the innkeeper is under no duty at Common law to provide a traveller with shelter and accommodation for the night, although the coffee-room be unoccupied and a traveller demands to be allowed to pass the night there (*Browne v. Brandt*, (1902) 1 K. B. 696).

**Liabilities.**—Innkeepers are liable only for the goods which are brought within the inn.

An innkeeper is not an insurer of the goods of his guest, but is liable for negligence (*Dawson v. Chamney*, 5 Q. B. D. 164), and is bound to take something more than ordinary care of his guest and his guest's goods (*Campbell*). It is in his character as innkeeper that he is required to exercise such diligence; but if he is a mere bailee (*Hyde v. Mersey Nav. Co.*, 5 T. R. 389), or a mere lodging-house keeper (*Dansey v. Richardson*, 3 E. & B. 144; *Holder v. Soulby*, 8 C. B. N. S. 254), he would only be liable for ordinary negligence. An innkeeper cannot negative his liability for the safe custody of the goods of a guest by proving that there was no negligence on his part (*Butler & Co. v. Quilter*, 17 T. L. R. 159).

**Defences.**—In exoneration of his liability an innkeeper may show that the goods were exclusively in the guest's own custody; he may prove contributory negligence in the guest, or loss from inevitable force (as that of an armed mob), act of God, or King's enemies, or by robbery or burglary, by persons from without the inn.

A person who keeps a temperance hotel is an innkeeper (*Cunningham v. Philp*, 12 T. L. R. 352). The Common law obligation on an innkeeper to provide accommodation continues so long only as the guest is a traveller. In the case, therefore, of a person wishing to reside at an hotel the proprietor is not bound to allow him to remain after reasonable notice to quit has been given. The law of England had conferred exceptional privileges and exceptional liabilities upon innkeepers, but only so far as regards persons in the position of travellers (per Lopes, L. J., in *Lamond v. Richards*, (1897) 1 Q. B. 541). If an innkeeper at the request of his guest sends his horse to pasture and the horse is stolen, the innkeeper is not, as such, liable for the loss (*Calve's case*). But if the guest does not request it, but the innkeeper does it of his own accord, he is liable for the loss (*Howley v. Smith*, 25 Wend, 642). An innkeeper is liable for the theft of his servant from a guest at his inn (*Morgan v. Revey*, 6 H. & N. 265). The plaintiff, being on his way from his place of business in Liverpool to his home outside the town, went into the dining-room of an hotel in Liverpool, kept by the defendants, to get a meal.

and put his overcoat in a place where coats were ordinarily kept in that room. The coat was missing when he finished his meal. Held, that the defendants were liable (*Orchard v. Bush & Co.*, (1898) 2 Q. B. 284).

*Leading cases.*—**Caley's case.**

## 5. PHYSICIANS AND SURGEONS-

In the case of medical men, not only is the duty they have to perform difficult, but the consequences of the neglect may be disastrous. Therefore more than an ordinary degree of skill is necessary for a surgeon who undertakes to perform surgical operations (*Slater v. Baker*, 2 Wils. 359). He does not undertake to perform a cure or even to use the highest possible skill, but a proper and competent degree of skill (*Lamphier v. Philpos*, 8 C. & P. 475). If he fails in this, he is liable for negligence.

The plaintiff, who was engaged to marry the daughter of M, was falsely accused of being affected with a venereal disease. M employed the defendant, a physician, to examine the plaintiff, who consented to the transaction and to report the result to himself and family. The defendant mistakenly pronounced the disease to be venereal. In consequence the engagement was broken. The Court held that the defendant's duty of exercising ordinary diligence, care and skill in a professional undertaking extended to a case where only information was sought; and that the breaking of the engagement was a damage not too remote to sustain the action (*Harriot v. Plimpton*, 44 N.E. Rep. 992. The decision is criticized at 7 *Mad. L. J.* 53. See also, *Dubois v. Decker*, 130 N. Y. 325). A, knocks down and tramples on B, and induces strangulated hernia. An operation is performed by C, a surgeon of experience and skill, but negligently. Death ensues. The injury was such that B would certainly have died of it if no operation had been performed, and the intervening of C independently made no difference in the peril to which the right to immunity of person was already exposed prior to the intervention. A's conduct was efficient to bring about B's death. The effect was said to have proceeded from his conduct (*Santer v. R. R.*, 66 N. Y. 50).

## 6. SOLICITORS.

Solicitors, like physicians, evidently undertake to bring to the duties they have to perform something more than ordinary care, for they are persons of skill and knowledge,



and, like physicians, undertake matters of the very highest difficulty and importance. It is very clear that ordinary neglect, where so great care is demanded becomes very grave, and, in the language of some of the Judges, is "gross negligence." As the duty is most difficult it is not every error or want of success that is to be attributed to negligence.

A solicitor will be liable if his client proves negligence operating to produce the loss of the cause (*Godefroy v. Jay*, 7 Bing. 314). A solicitor is also liable for the negligence of his agent (*Simmons v. Rose*, 31 Beav. 11), partner (*Norton v. Cooper*, 3 S. & G. 375), or clerk (*Floyd v. Nangle*, 3 Atk. 568).

Where a solicitor is guilty of negligence or misconduct the Court may order him to make good any loss occasioned by such negligence or misconduct. But where the loss does not flow from his act or default the Court will not, merely because he has been guilty of misconduct, mulct him in damages (*Marsh v. Joseph*, 13 T. L. R. 136).

An action to recover damages owing to the alleged negligence of a solicitor while retained on behalf of the plaintiff survives against the personal representatives of the solicitor (*Daries v. Hood*, 19 T. L. R. 158).

*Indian law.*—An advocate is liable to an action for damages, at the suit of his client for a *mala fide* breach of duty or wrong independent of contract (*Mukdum Shah v. Plowden*, P. R. 20 of 1874).

## 7. BANKERS.

Like physicians and lawyers, bankers hold themselves out to be persons of care and skill and they undertake most important duties. With respect to money placed in their hands by their customers for the ordinary purposes of banking, whether they receive a profit or not, they hold themselves out as persons worthy of trust, and as persons

of skill, and they must be expected to use something more than ordinary care (*Wharton*). In other cases, they are liable for ordinary negligence only. Bankers are liable for negligence in paying forged cheques (*Bank of Ireland v. Trustees of Evan's Charities*, 5 H. L. C. 389), and there can be little doubt that they are bound to exhibit skill in detecting such forgeries.

### 3. *Where a higher duty has been undertaken.*

Where persons possess or use dangerous things they are bound to exercise more than ordinary care in their control of them, and, in some cases, to keep them safe at their peril. Of this class are persons keeping—

- |                       |               |
|-----------------------|---------------|
| 1. Dangerous animals. | 3. Gas.       |
| 2. Dangerous goods.   | 4. Machinery. |

#### I. DANGEROUS ANIMALS.

There are two classes of animals—

- (1). Those that are of a dangerous character (animals *feræ naturæ*) which a person must keep at his peril; and  
 (2) those not of a dangerous nature (animals *mansuetæ naturæ*) which a person may keep without being liable for the damage they may do, unless he knows that they have some vicious propensity (*Filburn v. People's Palace & Aquarium Co.*, 25 Q. B. D. 261).

*Indian law.*—A man would be liable for injury caused by his animal, whether tame or wild, if it is proved that the injury was due to the owner's negligence (*Moung Kyaw v. Ma Kyin*, 7 Burma L. R. 73).

(1). **Animals *feræ naturæ*.**—A person who keeps a savage animal does so at his peril. He is bound to keep it so far under control as to prevent it indulging its propensity and inflicting injury. If the animal escapes and hurts anyone, it is not necessary for the party injured to

show that the owner knew the animal to be specially dangerous. "Though the owner have no particular notice that he did any such thing before, yet if it be a beast that is *feræ naturæ*, as a lion, a bear, a wolf, yea an ape or monkey, if he get loose and do harm to any person, the owner is liable to an action for the damage" (Hale P. C. i, 430).

Whosoever keeps an animal accustomed to attack and bite mankind, with knowledge that it is so accustomed, is *prima facie* liable at the suit of any person attacked and injured by the animal, without any averment of negligence or default in the securing or taking care of it. The gist of the action is the keeping of the animal after knowledge of its mischievous propensities (*May v. Burdett*, 9 Q. B. D. 101).

In the leading case of *May v. Burdett* (9 Q. B. D. 101), the action was for keeping a monkey which the defendant knew to be accustomed to bite people, and which bit the plaintiff; and the defendant was held liable. Where an elephant exhibited by the defendants injured the plaintiff, it was held that the plaintiff was entitled to recover damages from the defendant as elephant was an animal *feræ naturæ* (*Filburn v. P. P. & A. Co.*, 25 Q. B. D. 258).

*Indian case.*—In this country a man is not liable for any damage done by his elephant without any proof of negligence or that he knew it to be of a vicious disposition. In view of the manner in, and extent to, which elephants are employed in this country, such a proposition would be manifestly unjust (*Moung Kyaw v. Ma Kyin*, 7 Burma L. R. 73).

*Leading case.*—**May v. Burdett.**

(2). **Animals mansuetæ naturæ.**—As to these animals the rule is clear beyond doubt that the knowledge of the defendant must be shown of their propensity to do the act in question. The owner is liable for their trespasses and consequent damage, but not for other injuries unless proof of *scienter* is given as to the propensity of the animal itself to do the act in question. It not being usual for dogs (*Mason*

v. *Keeling*, 12 Mad. 332), or horses (*Cox v. Burbidge*, 13 C. B. N. S. 430), or rams (*Jackson v. Smithson*, 15 M. & W. 563), or bulls (*Hudson v. Roberts*, 6 Ex. 697) to attack human beings, the plaintiff complaining of such injury from such animals must establish that the defendant knew they were exceptionally savage and prone to injure mankind. A single instance of the ferocity of such animals is sufficient notice.

The defendant was held liable, it being proved that the dog had been bitten by a mad dog, and that the defendant had a suspicion of his madness by tying him up (*Jones v. Perry*, 2 Esp. 482). It has been held that, if the owner of a dog appoints a servant to keep it, the servant's knowledge of the animal's disposition is the knowledge of the master for it is the knowledge acquired by him in relation to a matter within the scope of his employment (*Balwin v. Casella*, L. R. 7 Ex. 325). But where the complaint is made to a servant who has no control over the defendant's business, nor his yard where his dog was kept, the knowledge of the servant would not necessarily be that of the master (*Stiles v. The Cardiff S. N. Co.*, 33 L. J. Q. B. 310). The plaintiff, defendant's foreman, knew that a ferocious dog was kept for the safety of premises loose in the yard, but he went incautiously into the yard and was bitten; the defendant was not liable (*Brock v. Copeland*, 1 Esp. 203). An action was brought against the owner of a dog for killing sheep, the allegation being that the defendant knew that the dog was accustomed to kill sheep, but the proof given in support of it was that the dog had previously sprung on a man. This was held to be insufficient, unless it could also be shown that every dog which jumped at men would of necessity bite sheep (*Hartley v. Halliwell*, 1 Stark. 212). In actions for injury sustained by a man through the bite of a dog, the *scienter* which it is necessary to show is that the dog had a ferocious disposition towards mankind, that he *had* bitten or *attempted* to bite mankind. It is not sufficient to show that it had to the defendant's knowledge, chased and bitten a goat (*Osborne v. Chocqueel*, (1896) 2 Q. B. 109). Where a horse kicked a child it was held that in the absence of proof of knowledge of a special vicious disposition the owner was not liable (*Cox v. Burbidge*, 13 C. B. N. S. 430).

*Indian case.*—In a fight between two buffaloes belonging to different owners, one was killed. Held, that the owner of the buffalo which killed the other was not liable to make compensation in the absence of neglect or carelessness on his part in keeping the animal (*Mungul Sing v. Lehna Ling*, P. R. 72 of 1870).

It has been found desirable specially to modify the

Common law with respect to injuries inflicted by dogs on *cattle* and *sheep*, and to dispense with the necessity of proving *scienter*, and this was effected by 28 & 29 Vic. c. 60).

## 2. DANGEROUS GOODS.

Of this class are :—

- |                 |                          |
|-----------------|--------------------------|
| (1) Fire.       | (4) Explosive materials. |
| (2) Fire-arms.  | (5) Poisonous drugs.     |
| (3) Fire-works. |                          |

### (1). *Fire.*

Every person who lights a fire is clothed by the Common law with a heavy responsibility to his neighbours as regards the lighting, safekeeping, and spreading of such fire. The making of a fire involves the bringing on land of something not naturally there, and therefore the owner of the fire is bound to keep it in at his peril.

**Domestic purposes.**—A man is not liable for damage caused by “domestic fire,” *i. e.*, a fire which began in his house or on his land, provided that it originated by accident and without negligence (*Tuberville v. Stamp*, 1 Sack. 13).

**Non-domestic purposes.**—In this case a person is absolutely liable for damage caused by fire.

Railway companies are bound to prevent sparks flying from their engines upon the lands adjoining their lines so as to cause injury, unless they are protected by statutory powers, and where they are so protected, they must still use something more than ordinary care to prevent damage from a cause so likely to be dangerous (*Vaughan v. T. V. Ry.*, 5 H. & N. 679). If the railway company had not express statutory power to use such engines, it is liable for damage by fire proceeding from it, though negligence be negatived, because it does so at its peril (*Jones v. Festinoig Ry.*, L. R. 3 Q. B. 733).

A farmer in Shropshire had a hayrick in a highly dangerous condition. It smoked and steamed—unmistakeable signs of being about to take fire. To the advice and remonstrance of his neighbours who pointed out its condition, all the answer the farmer vouchsafed was that he would chance it. Finally, he did take a kind of precaution, he made a chimney through the rick, which, though done with good intentions, was scarcely wise. The rick took fire, and burnt the plaintiff's cottage in the next field. The farmer was held responsible for damage (*Vaughan v. Menlove*, 4 Scott 244). Where a maid-servant, whose business was simply to light a fire, took it into her head to clear a chimney of soot by setting it on fire, and burnt the whole place down, she was held liable (*McKenzie v. McLeod*, 4 M. & Sc. 249). Where a man set fire to brush and the wind blew the sparks upon his neighbour's land, it was said that he was liable whether he might or might not have reasonably anticipated the particular manner in which the fire was actually communicated (*Higgins v. Dervev*, 107 Mass 494). The plaintiff was the proprietor of a plantation adjoining the embankment of the defendant railway company. The grass growing in the plantation was of a very combustible nature, and so were some dry branches. In fact, the whole was graphically described by the plaintiff himself as being "in just about as safe a state as an open barrel of gun-powder would be in the Cyfartta Rolling-mill." One day this susceptible plantation was discovered to be on fire, and eight acres of it were burnt. It was not disputed that it had taken fire from the spark from one of the defendant's engines, but they contended, and it was decided, that they were not responsible, as they were authorized to use such engines, and had adopted every precaution that science could suggest to prevent injury (*Vaughan v. Taff Vale Ry.*, 5 H. & N. 679).

## (2). *Fire-arms.*

Fire-arms, which are loaded, are highly dangerous things, and more than ordinary care is therefore necessary in dealing with, or handling, them.

The defendant having left a loaded gun with another man, sent a young girl to fetch it with a message to the man in whose custody it was to remove the priming, which the latter, as he thought, did, but, as it turned out, did not do effectually. The girl brought it home, and thinking that the priming having been removed the gun could not go off, pointed it at the plaintiff's son, a child, and pulled the trigger. The gun went off and injured the child. The defendant was held liable. "As by this want of care, (that is, by leaving the gun without drawing the charge or seeing that the priming had been properly removed), the instrument was left in a state capable of doing mischief, the law will hold the defendant responsible. It was incum-

bent on him who, by charging the gun, had made it capable of doing the mischief, to render it safe and innoxious" (per Lord Ellenborough, in *Dixon v. Bell*, 15 M. & S. 198).

*Leading case.*—*Dixon v. Bell*.

(3). *Fire-works*. (4). *Explosive materials*.

Persons are bound to use the very greatest care in the use of fire-works and other highly explosive materials, or materials otherwise dangerous or destructive. Owners and controllers of dangerous goods are bound to exercise more than ordinary care for they have not only taken upon them a matter of business requiring great care, but the law having regard for human life and safety, demands great care from them. It may even be doubted whether in some cases it would not be held that a man must keep dangerous goods at his own peril. On this principle people sending goods of an explosive or dangerous nature to be carried are bound to give notice of their nature, and, if they do not, are liable for resulting damage.

Where the defendant sent nitric acid to a carrier without warning, and the carrier's servant, handling it as he would handle a vessel of any harmless fluids, was injured by its escape, the defendant was held liable (*Farrant v. Barnes*, 11 C. B. N. S. 553). A sold gun-powder to a boy, B, eight years old. He took it home and kept it in a cup-board with the knowledge of his parents for a week. His mother gave him out some powder on two occasions, and on each occasion he fired it off with her knowledge. On the second occasion he was injured by the explosion. In an action brought against A, on behalf of B, for compensation for the injury caused by A's selling the powder to B, A was held not responsible, as the parents took the control of the gun-powder at their disposal on their premises. Their conduct had interposed between A and B and was independent and wrongful, and the injury was directly traceable to them (*Carter v. Towne*, 103 Mass. 507). Where the vendor of a tin containing disinfectant powder knew that it was likely to cause danger to a person opening it, unless special care was taken, and the danger was not such as presumably would be known to or appreciable by the purchaser, unless warned of it. Held, that, independently of any warranty, there was cast upon the vendor a duty to warn the purchaser of the danger (*Clarke v. Army & Navy, Co-op. Soci.*, (1903) 1 K. B. 155; see *Priest v. Last*, 19 T. L. R. 278).

*Indian case.*—The defendant sent a box containing combustible and dangerous substances to the Railway company without notifying the contents as he was bound by law to do, and this box was placed near where the plaintiff's husband was at work, and it suddenly exploded, and the plaintiff's husband sustained such injuries in consequence that he died from the effects of them. Held, that a person who sent an article of a dangerous and explosive nature to a railway company to be carried by such company, without notifying to the servants of the company the dangerous nature of the article, was liable for the consequences of an explosion, whether it occurred in a manner which he could not have foreseen as probable, or not. Also that such person was liable for the consequences of an explosion occurring in a manner which he could not have foreseen, if he omitted to take reasonable precautions to preclude the risk of explosion (*Lyell v. Ganga Dai*, 1 All 60, F. B.)

(5). *Poisonous drugs.*

Persons dealing with poisonous drugs are bound to take more than ordinary care as the mischief which is likely to occur for want of such care is extremely dangerous to the public.

A dealer in drugs, who carelessly labels a deadly poison as a harmless medicine, and sends it so labelled in the market, is liable to *all* persons, whether purchasers or not, who, without fault on their part, are injured by using it as medicine in consequence of the false label, however many intermediate sales it may have passed through before it reached the hands of the person injured. The liability arises out of the duty which the law imposes upon him to avoid acts in their very *nature* dangerous to the lives of others (*Thomas v. Winchester*, 6 N. Y. 397).

3. GAS (*coal-gas*).

With respect to the duties of gas-companies, and persons having the management of gas, it would appear that they are bound to exercise the very greatest care, for they are using a material difficult to manage, and of a very dangerous character in many ways, for it is at once explosive and poisonous, and, not unreasonably, these companies are bound in heavy penalties by their Acts to exercise the greatest care, and even to become in some sense insurers (*Hipkins v. Birmingham Gas Co.*, 6 H. &



N. 250—*Smith*). Gas is not of itself a dangerous thing, but with atmospheric air forms a highly dangerous explosive mixture, and also makes the mixed atmosphere incapable of supporting life. Those who carry on operations to the public are bound to use all reasonable precautions (*Blenkiron v. G. C. G. Co.*, 2 F. & F. 440).

A gas-fitter was employed to repair a gas-metre. He took it away and supplied a temporary pipe. The plaintiff, a servant, in the course of his duty, and without any negligence, went to light the gas, and was injured by the negligence of the gas-fitter. Held, that the gas-fitter was liable (*Parry v. Smith*, 4 C. P. D. 325). A gas company was held liable for the injuries sustained by the plaintiff owing to an explosion of gas in a highway; the gas having escaped through cracks in the pipes, which were caused through the negligent laying down of pipes (*Price v. S. M. G. Co.*, 12 T. L. R. 31).

#### 4. MACHINERY.

Persons employing machinery are bound to provide machines reasonably fit for use, and in a matter where the thing itself is difficult to make and to control, and the effects of bad manufacture or careless control might be very serious, the persons employing machinery are bound to use something more than ordinary care (*Smith*).

There are several Acts requiring persons using dangerous machinery to take proper precautions (Mines Regulation Act, 35 & 36 Vic. c. 76; Threshing Machines Act, 41 Vic. c. 12; Factories Act, 41 Vic. c. 16).

#### 4. *Where a greater amount of care is required by law for public benefit.*

Where a positive duty is imposed by statute, it would seem that something more than ordinary care is required of the person who has to perform it, and it is certain that such person cannot shield himself by saying that he employed a competent person (contractor or other) to perform it (*Gray v. Pullen*, 5 M. & S. 970).

## II. NEGLIGENCE OF DUTIES REQUIRING ORDINARY CARE.

By the expression "duties requiring ordinary care" is meant those duties devolving upon persons who do not hold themselves out as having, nor is there demanded of them, any peculiar or extraordinary care or skill.

1. *Neglect of duties by owners and occupiers of real property.*

The rights which a man has over his own land are, like other rights, subject to modification by the conflicting rights of others. The allegation of negligence presupposes the existence of equal rights.

Where an owner of property is using his property for his own advantage only, he is bound to take more than ordinary care (*Smith v. Fletcher*, L. R. 2 Ap. Ca. 781); where for the benefit of both the parties, ordinary care; and where for the benefit of another, less than ordinary care.

For negligence in respect to rights of support see Wrongs to Easement, Chapter XVI.

Generally speaking, if a nuisance is created, and any one is injured by the nuisance in a particular manner, and not in common with the public, an action of negligence will lie (*Barnes v. Ward*, 9 C. B. 392). This is the principle of the decisions as to injuries arising from excavations or obstructions upon or near roads and paths upon which strangers have a right to be.

2. *Neglect of duties by servant.*

See Chapter VIII.

3. *Neglect of duties by masters.*

(a) BREACH OF DUTY TO SERVANTS.

(b) BREACH OF DUTY TO OTHERS.

See Chapter VIII.

### III. NEGLECT OF DUTIES REQUIRING LESS THAN ORDINARY CARE.

Amongst ordinary duties requiring no particular skill or care *per se*, and requiring something less than ordinary care by reason of their being performed solely for the benefit of another, are those of—

1. Gratuitous depositaries.
2. Gratuitous loan—in the case of the bailor.
3. Gratuitously dedicating a way to the public.
4. A volunteer, doing an act without request, or a person rendering gratuitous service.

#### *Burden of proof in actions of negligence.*

As a rule, the onus of proving negligence is on a plaintiff (*Hammack v. White*, 11 C. B. N. S. 588); and of proving contributory negligence on the defendant (*Dublin W. Ry. v. Slattery*, 3 App. Cas. 1169; *Wicklow v. L. & S. W. Ry.*, 12 App. Cas. 41; *Kæghar v. A. Yule & Co.*, 14 W. R. 45; *Woodehouse v. C. & S. E. Ry.* 9 W. R. 73).

The plaintiff must not merely establish the facts of the defendants' negligence and of his own damage, but he must show that the one was the effect of the other. He must prove, where there is *no* contract, facts inconsistent with due diligence on the defendant's part. But where there is a contract or a personal undertaking, he must prove such contract or personal undertaking and injury to himself.

**Presumption.**—Under certain circumstances the mere happening of an accident will afford *prima facie* evidence that it was the result of want of due care: *res ipsa loquitur* (the things speaks for itself). This is so, for instance, where the thing that caused the mischief was exclusively under the defendant's or his servants' control, that it is hardly credible that any harm could have come from it if proper care had been taken (*Scott v. L. D. Co.*, 34 L. J. Ex. 220; *Byrne v. Boadle*, 2 H. & C. 722; *Choutmull v. The*

*Rivers Steam Naviga. Co.*, 24 Cal. 786; 26 Cal. 398 P. C.; *Tan Taik v. Irrawady Co.*, 7 Burma L. R. 236). The defendant may rebut this presumption if he can.

**Defendant liable.**—A barrel of flour fell out of a window of the defendant's shop upon the plaintiff passing in the street below. And as a barrel of flour would not ordinarily fall out of a window when proper care is taken in managing it, there was presumptive evidence of negligence on the part of the defendant and that the onus of proof was cast on him to show that the accident was not caused by his negligence (*Byrne v. Boadle*, 2 H. & C. 722). The plaintiff was injured by the fall of a large packing case belonging to the defendant, while making inquiries for the defendant at the door of a house in which the latter had offices. He had received a push from the defendant's servant who was watching a packing case, and immediately the case which stood against the wall of a house, fell and struck him on the foot. There was no evidence why the packing case fell, or who placed it against the wall. It was held that the facts showed a *prima facie* case of negligence as "packing cases do not usually fall of themselves unless there has been some negligence in setting them up," (*Briggs v. Oliver*, 4 H. & C. 403). Where a bag of sugar fell from a crane fixed over a doorway under which the plaintiff was lawfully passing, in the absence of any explanation of the cause of the bag falling, the defendants were held liable (*Scott v. London Dock Co.*, 3 H. & C. 596). The plaintiff was injured by the fall of a brick while passing under a railway bridge extending over the highway. The bridge rested on perpendicular brick walls having pillars; and from the top of one of these pillars the brick fell shortly after the passing of a train; it was held that these facts raised a presumption of negligence against the defendant (*Kearney v. London B. Ry.*, L. R. 5 Q. B. 411). In an action against the proprietor of a stage-coach, the fact that the coach was upset and the plaintiff injured was sufficient to raise a presumption of negligence or want of skill in the driver (*Christie v. Griggs*, 2 Camp. 79). Pulling a wrong rein is evidence of negligence (*Wakeman v. Robinson*, 1 Bing. 213); so too is the spurring a horse when it is within kicking distance of a passer by (*North v. Smith*, 10 C. B. N. S. 572); or blowing of steam at a level crossing (*Manchester S. J. Ry. v. Fullarton*, 11 W. R. 754). In front of a window of defendant's shop, and immediately abutting on a public highway, was a low wall eighteen inches high, defendant's property, on the top of which was a row of sharp spikes. The plaintiff a child of five, was found standing by the wall, bleeding from a wound such as might have been caused by her falling upon the spikes. Held, that there was evidence that the injury was caused by the wrongful act of the defendants in maintaining the nuisance while the plaintiff was using the highway in a proper manner (*Fenna v. Clare & Co.*, (1895) 1 Q. B. 199).

**Defendant not liable.**—Mere fact of a man driving on the wrong side of the road is no evidence of negligence, in an action brought against him for running over a person who was crossing the road on foot (*Lloyd v. Ogelevy*, 5 C. B. N. S. 667). Where the plaintiff was injured by the fall of a timber and a roll of zinc from the roof of a portico undergoing repairs, under which he was standing; it was held that no presumption of negligence could be raised from this fact. "It was incumbent upon the plaintiff to show that the defendants knew or had the means of knowing or were bound to take steps to know, the condition of the roof; and it did not follow that because they knew that the roof needed repairing they also knew that it would not bear the weight of a man" (*Welfare v. London & B. Ry.*, L. R. 4 Q. B. 693). A goods train and a passenger train met and were passing each other on a double line of railway. Some timber on a truck in the goods train projected and struck the passenger train, injuring a passenger. The timber had been loaded on the truck without stanchions, and was secured by a chain only, which broke and there was evidence that the breakage was caused by a latent flaw in the chain. There was evidence that it would have been safer to load the timber with stanchions, but that the use of them for that purpose was comparatively recent, and there was no evidence of any accident having happened from not using the stanchions. An action being brought by the passenger against the railway company, it was held that it was for him to show that the accident was caused by the negligence of the company and that the company was not bound to show how the accident happened (*Hanson v. L. Y. Ry.*, 23 W. R. 297). The plaintiff's wife, having safely crossed in front of an omnibus, was startled by some other carriage, and ran back; the driver had seen her pass, and then turned round to speak to the conductor, so that he did not see her return in time to pull up and avoid mischief. The omnibus was on its right side and going at a moderate pace. Here there was no evidence of negligence on the part of the defendant, the owner of the omnibus. Held, that the defendant was not negligent (*Cotton v. Wood*, 8 C. B. N. S. 568). Where the dead body of a man was found on the defendants' railway near to a level crossing, the man having been killed by a train which bore the usual head-lights, but did not whistle, it was held in an action by the widow, that there was no evidence of negligence on the defendants' part. In the course of the judgment it was said:—"One may surmise, and it is but surmise and not evidence, that the unfortunate man was knocked down by a passing train while on the level crossing; but assuming in the plaintiff's favour that fact to be established, is there anything to show that the train ran over the man rather than that man ran against the train?" (per Lord Halsbury, in *Wakelin v. L. & S. W. Ry.*, 12 App. Cas. 41). Where a passenger is seated in a railway carriage, the fact that his finger is crushed owing to the shutting

of the carriage door by a railway servant on the platform is not evidence of negligence in an action against the company (*Drury v. N. E. Ry.*, (1901) 2 K. B. 322).

### *Judge and jury.*

According to the English law it is for the Judge to say whether any facts have been established by evidence from which negligence *may* be reasonably inferred ; and then it is for the jury to say whether, from those facts, when submitted to them, negligence *ought to be* inferred (*Metropolitan Ry. v. Jackson*, 3 App. Cas. 193). In short, a case ought always to be left to the jury, unless it would be absurd and unreasonable to deduce negligence from the facts proved.

But where negligence is said to be a question of *mixed law and fact*, what it means is, that the whole question of negligence is and should be generally left to the jury under instructions for their guidance, the Judge is to say that if such and such facts are found constituting the supposed act or omission, the verdict must be for the plaintiff ; and he may further instruct the jury what, as matter of common knowledge or of decided law, the conduct of a prudent man should be under the given circumstances ; or if under the given circumstances no recognized standard of conduct exist and none has been established by statute or decided cases, he may lay down what it ought to be (*Ball*).

### *Damages.*

In some cases, the amount of damages will depend upon the character of the negligence, as for instance, if it be of a *reckless* character. And upon the other hand it would seem that the conduct of the plaintiff (not amounting to contributory negligence so as to be an answer to the action), may be given in evidence in mitigation of damages (*Smith*). The recovery of insurance money can-

not be set up in mitigation of damages for negligence (*Yates v. Whyte*, 4 Bing. N. S. 272 ; *Bradburn v. G. W. Ry.*, L. R. 10 Ex. 1).

If a plaintiff obtains a judgment against a master or servant, he cannot afterwards sue the other of them. Where the plaintiff sued the owner of an omnibus for personal injuries, but had accepted a sum of money from the driver awarded by a Magistrate as compensation, it was held a good answer to the action, eventhough the sum was quite inadequate, and although the money was paid by the driver and not by the owner of the omnibus (*Wright v. London, &c. Co.*, 46 L. J. Q. B. 493).

**Personal injuries.**—With respect to damages for personal injuries, the measure is the loss of time, expense incurred, pain and suffering, and permanent injury causing pecuniary loss, as to which, it is said, that the amount awarded must not be an equivalent for the loss but some reasonable sum (*Armsworth v. S. E. Ry.*, 11 Jur. 758). It is said that where it is impossible to estimate accurately the amount of damage done, the defendant must suffer (*Leeds v. Amhurst*, 20 Beav. 239). If some damage must have happened to the plaintiff, irrespective of the defendant's act, that must be deducted from the whole amount of damage done, for the defendant is only liable for the consequences of his own act (*Workman v. G. N. Ry.*, 32 L. J. Q. B. 279).

The plaintiff is entitled to such *prospective* damages as will to a reasonable certainty arise (*Richardson v. Mellish*, 2 Bing. 240 ; *Ingram v. Lawson*, 2 Sc. 471 ; *Goslin v. Cory*, 8 Sc. N. R. 24), and the same has been held in respect of injury to real property (*Lamb v. Walker*, L. R. 3 Q. B. D. 389).

Where the plaintiff is disabled for life the measure of damages is not to be taken from the amount of an annuity which would replace the annual salary of the deceased, for it does not follow that he would have retained his situation for the whole of his life ; but a reasonable sum must be given (*Rapson v. Cubit*, E. & M. 64).

The plaintiff was a surgeon of middle age, and previously of robust health, making a professional income of between £6,000 and £7,000 per annum. The injury complained of had rendered his condition helpless and hopeless. It was likely that he would never recover, and certain that he could never resume his practice. Field, J., in charging the jury divided the claim for damages into the heads of compensation for *personal suffering and injury*, and for loss of *future income*. As to the first he said: "Perfect compensation is hardly possible, and would be unjust. You cannot put the plaintiff back again into his original position, but you must bring your reasonable common sense to bear, and you must always recollect that this is the only occasion on which compensation can be given. Dr. Phillips can never sue again for it. You have, therefore, now to give him compensation once for all. He has done no wrong; he has suffered a wrong at the hands of the defendants, and you must take care to give him full and fair compensation for that which he has suffered." To the sum so arrived at, all costs of medical attendance, journeys, &c., arising from the accident, would necessarily be added. As regards the second head he said: "you are not to give the value of an *annuity* of the same amount as the plaintiff's average income for the rest of the plaintiff's life. If you gave that you would be disregarding some of the contingencies. An accident might have taken the plaintiff off within a year. He might have lived, on the other hand, for the next twenty years, and yet many things might have happened to prevent his continuing his practice." It was suggested that the fact that the plaintiff had a secured income of £3,500 per annum was a legitimate consideration upon which the jury might act in reducing the damages. The Judge told the jury he could not remove that fact from their view, though he stated his opinion, that it ought not to affect the amount which he was entitled to receive as compensation, either for personal injury or for loss of income. The jury gave a verdict of £7,000, but a new trial was ordered on the ground that the damages were insufficient (*Phillips v. L. & S. W. Ry.*, 4 Q. B. D. 406).

**Injury to property.**—In such cases the measure of damages is the cost of re-instating the property, if the plaintiff, as a reasonable man, would have reinstated the property; but if not, then depreciation in the value is the true measure. If a chattel be lost or destroyed through the negligence of the defendant the measure of damages is the value of the chattel, but if the chattel be only injured then the depreciation in its value is the measure, with an extra allowance for the loss of the use of the chattel while it is being repaired or replaced.



In an action for injury to a horse the proper measure of damages is the keep of the horse, the farrier's bill, and the loss in value of the horse (*Hughes v. Quentin*, 8 C. & P. 703), with some reasonable sum for any pecuniary loss of the use of the horse while under treatment (*Watson v. Lisbon Bridge Co.*, 14 Maine 201; *Gillet v. Western Ry.*, 8 Allen 560), or for hiring another horse to do his duty (*Johnson v. Holyoke*, 105 Mass. 80).

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## CHAPTER XXII.

### TORTS FOUNDED ON CONTRACT.

THERE is, indeed, a large class of cases known as implied contracts, where the law recognises a duty or obligation sometimes arising out of a preceding contract, and sometimes arising independently of any contract. In all those cases where the duty or obligation arises out of a precedent contract, the violation of the duty is in truth a breach of contract; but, as these cases present some features in common with that other branch of implied contracts which embraces duties independent of any contract, it was usual under the old mode of pleading to state in both these classes the facts out of which the duty or obligation arose, with or without an allegation that such duty arose therefrom. This mode of pleading being similar to that adopted in the case of an ordinary tort and different from that adopted in the case of an express promise, where the promise and a breach of that promise were alleged, these cases acquired the name of *torts founded upon contract*. In the form of pleading they resembled an ordinary tort; but in their essence they were breaches of contract and not torts (*Addison*).

The difference between **torts arising from contracts** and **torts independent of contract** is, that where a wrongful act is of the latter description the plaintiff's suit is styled an action *ex delicto*, and where of the former class, it is styled an action *ex contractu*, in which case it is necessary that there should be privity between the plaintiff and the defendant, for a man cannot sue upon a contract when there is no privity between himself and the defendant. Privity between the parties is absolutely necessary to support an

action *ex contractu*, whereas in the case of an action *ex delicto* the right of action has nothing to do with privity between the parties, but it exists simply because a right has been withheld or violated (*Gerhard v. Bates*, 2 E. & B. 476).

Where there is a privity of contract between the plaintiff and the defendant, there are two classes of cases in which the remedy of the plaintiff for damage from a breach of duty arising out of the contract, is properly an action in tort, *viz.*, (1) where the damage is caused by negligence; and (2) where it is consequent upon fraud. It is obvious that such an injury is a tort, and is very distinguishable from a mere breach of contract (*Collett*).

**Division.**—The class of injuries, which lie on the borderland, as it were, between contract and tort, and for which an action *ex contractu* or *ex delicto*, may generally be brought at the pleasure of the party injured is divided into three divisions by Pollock as follows.—

I. Alternative forms of remedy on the same cause of action.

II. Concurrent or alternative causes of action.

III. Causes of action in tort dependent on a contract not between the same parties.

1. *Alternative forms of remedy on the same cause of action.*

Although tort in general differs essentially from contract as the foundation of an action, it not unfrequently happens that a particular transaction admits of being regarded from two different points of view, so that when contemplated from one of these it presents all the characteristics of a good cause of action *ex contractu*; and, when, regarded from the other, it offers to the pleader's eye sufficient materials whereupon to found an action *ex delicto*

(*Legge v. Tucker*, 1 H. & N. 500). Thus, carriers warrant the transportation and delivery of goods entrusted to them; solicitors, surgeons, and engineers, undertake to discharge their duty with a reasonable amount of skill and with integrity; and for any neglect or unskilfulness by individuals belonging to one of these professions, a party who has been injured thereby may maintain an action either in tort for the wrong done or in contract at his election. In short, wherever there is a contract and something to be done in the course of the employment which is the subject of that contract—if there is a breach of duty in the course of that employment, the plaintiff may recover either in tort or in contract (*Brown v. Boorman*, 11 C. & F. 44); that is to say, “where there is an employment, which employment itself creates a duty, an action.....will lie for a breach of that duty, although it may consist in doing something contrary to an agreement made in the course of such employment by the party upon whom the duty is cast” (*Courtney v. Earle*, 10 C. B. 83—*Broom*.)

In all other cases under this head there are not two distinct causes of action even in the alternative, nor distinct remedies, but one cause of action with, at most, one remedy in the alternative forms. Where there is an undertaking without a contract, there is a duty incident to the undertaking (*Gladwell v. Steggall*, 5 Bing N. C. 733), and if it is broken there is a tort, and nothing else. The rule, that if there is a specific contract the more general duty is superseded by it, does not prevent the general duty from being relied on where there is no contract at all (*Austin v. G. W. Ry.*, L. R. 2 Q. B. 442). Even where there is a contract, the more general duty does not cease to exist, but it is said that the duty is “founded on contract.” The contract becomes the only measure of the duties between the parties. There might be a choice, therefore, between

forms of pleading, but the plaintiff could not by any device of form get more than was contained in the defendant's obligation under the contract (*Pollock*, 515),

Now that the forms of pleading are generally abolished or greatly simplified, it seems better to say that wherever there is a contract to do something, the obligation of the contract is the only obligation between the parties with regard to the performance, whether there was a duty antecedent to the contract or not. But injury which would have been a tort, as breach of a duty existing at Common law, if there had not been any contract, is still a tort (*Taylor v. M. S. & L. Ry.*, (1895) 1 Q. B. 134—*Pollock*, 516).

## II. *Concurrent causes of action.*

Herein we have to consider—

1. Cases where it is doubtful whether a contract has been formed, or there is a contract "implied in law" without any real agreement in fact, and the same act which is a breach of the contract, if any, is at all events a tort.

Where a railway company advertised, by their time tables, a through-train from London to Hull, after they knew that the connecting train (belonging to another company) had been discontinued, and a passenger, having made his arrangements on the faith of these time tables, travelled by an early train from London to Peterborough, one of the defendant company's stations, and after transacting his business there, asked for a ticket from Peterborough to Hull by the evening train, so advertised, and found there was no such train, and brought his action for damages, it was held that he was entitled to recover, as for a false representation (*Denton v. G. N. Ry.*, 5 E. & B. 860). A servant whose fare has been paid by his master can sue for loss of luggage; the principle being that the duty thrown upon the carrier by receiving the passenger and his luggage to be carried for reward, though arising out of a contract, is independent of the question by whom the reward is paid. The question turned upon the inquiry whether it was necessary to show a contract between the plaintiff and the railway company; and it was held that an action of this sort was in substance not an action of contract but an action of tort against the company as carriers, and the allegation of contract was altogether unnecessary (*Marshall v. Y. N. & B. Ry.*, 11 C. B.

655). The plaintiff's mother, carrying in her arms the plaintiff, a child over three years old, and consequently liable to pay half-fare, took a ticket for herself but not for the plaintiff. By the negligence of defendants, an accident occurred to the train, and the plaintiff was injured. When the plaintiff's mother took her ticket no question was asked as to the plaintiff's age by the defendants' servants, and there was no intention on the part of the mother to defraud the defendants. It was held that the plaintiff was entitled to recover for the injury he had sustained. Cockburn, C. J., and Shee and Lush, JJ., held this on the ground that there was an entire contract to carry both mother and child, which operated in favour of each, but Blackburn, J., on the ground that the right which a passenger by railway had to be carried safely, did not depend on his having made a contract, but that the fact of his being a passenger cast a duty on the company to carry him safely. If there has been *fraud* on the part of the plaintiff, or if the plaintiff had been taken into the train *without the defendants' authority*, no such duty would arise. But here the child, through an honest mistake on the mother's part, was taken into the train by the railway company, and was received as a passenger by their servants with their authority (*Austin v. G. W. Ry.*, L. R. 2 Q. B. 422). Thus, unless there be an intention in the passenger to defraud, the mere non-payment of fare will not exempt the railway company from liability for negligence.

*Leading case.*—**Denton v. G. N. Ry.**

2. Cases where A can sue B for a tort though the same facts may give him a cause of action against M for breach of contract. There may be two causes of action with a common plaintiff.

Plaintiff, a passenger, was hurt on alighting at a station owing to the carriages being unsuited to the platform, the station and the platform belonging to the S. W. Railway by whose clerk the plaintiff's return ticket was issued; but he *returned* by the train belonging to the defendant company, who had running powers on the S. W. line. It was held that the defendant company was liable solely on the ground that it actually received plaintiff as a passenger, and thereby undertook the duty of not exposing him to unreasonable peril in any matter incident to the journey. In this case, the following propositions were laid down—

(1). A railway company issuing a ticket for a journey partly over its own line and partly over the line of another company, is presumably responsible for the safety of the passenger over the whole journey, and is liable to him for injuries caused by the negligence of railway servants or defective construction of carriages, or stations, to whichever company they belong (*G. W. Ry. v. Blake*, 7 H. & N. 987; *Thomas v. Rhymney Ry.*, L. R. 6 Q. B. 266).

(2). Under certain circumstances, a railway company may be liable, though there was no direct contract with the person injured and suing (*Austin v. G. W. Ry.*, L. R. 2 Q. B. 442; *Marshall v. Y. N. Ry.*, 11 C. B. 655).

(3). There are cases in which the carrier may be liable, even though there be no direct contract for the carriage of the party injured and suing between the carrier and anybody: *Dalyell v. Tyer* (28 L. J. Q. B. 52), where the plaintiff had contracted with a public ferryman for a daily passage, and the ferryman having one day hired a boat and crew to take his place, and an accident having occurred to plaintiff through the negligence of the said crew, the owner of the boat and the crew were held liable to him (per Thesiger, L. J., in *Foulkes v. M. D. Ry.*, 5 C. P. D. 157).

If the company issuing the ticket has been guilty of the negligence which caused the accident, the fact that the accident occurred upon the line of another company will not make the latter company responsible to the injured party (*Wright v. Midland Ry.*, L. R. 8 Ex. 137). In the case of a through-ticket a company who has not issued the ticket, but who has received the passenger's luggage into their van, are responsible for the loss of it (*Hooper v. L. & N. W. Ry.*, 50 L. J. Q. B. 103; *Foulke's case* followed). Where a servant took a ticket of L. & T. Ry. Co. and he travelled in a train drawn by an engine of the S. E. Ry. Co., and the latter company also provided the signalman and so on, and owing to their negligence a collision happened, and he was injured, it was held that the master could sue the latter company. For although he could not sue the former company, because, *qua* them, the wrong was one arising out of contract in respect of which the servant alone could sue, yet the negligence of the latter company did not arise out of any contract. They were entire strangers to the contract, and their tort was a tort pure and simple and consequently the master could sue in respect of it (*Berringer v. S. E. Ry.*, 4 C. P. D. 163).

3. Cases where A can sue B for a tort though B's misfeasance may also be a breach of a contract made not with A but with M. There may be two causes of action with a common defendant, or the same act or event which makes A liable for a breach of contract to B may make him liable for a tort to Z.

Where a railway company was bound by a statute to carry any officer of the Post Office whom the Post-Master General should elect, and for which service the company was to be remunerated by the Post-Master General, and the plaintiff, an officer so selected, was injured by the negligence of the company; it was held that, though there was no contract between the plaintiff and the company, he was entitled to bring an action for negligence (*Collett v. N. & N. W. Ry.*, 16 Q. B. D. 989). So an officer, carried under contract with the Gov-

ernment of India, may sue for an injury done to his property through the railway company's negligence whilst the goods were in their custody, though he could not sue the railway company for the non-performance of their duties as carriers (*Martin v. G. L. P. Ry.*, L. R. 3 Ex. 9). The plaintiff's servant took a ticket, which he had paid for with the plaintiff's money, for a journey on the defendants' line. He took with him a portmanteau in which was his livery which belonged to the plaintiff. At the station the portmanteau was accepted by the company as his personal luggage—they not being aware that it contained goods in which the plaintiff had an outstanding right—and was handed over to one of the company's servants, who negligently overturned it in front of a train, so that it was run over by the train and the goods in it were destroyed. In an action by the plaintiff against the defendants for damages for injury to her property caused by the negligence of the defendants' servants, it was held that as the goods were lawfully with the defendants' license on their premises, they were answerable for any injury caused to the goods by the misfeasance of their servants, not on the ground of a breach of any contract between the plaintiff and the defendants, for there was none such, but as a tort committed by the defendants' servants for which the defendants were responsible (*Meux v. G. E. Ry.*, (1895) 2 Q. B. 387).

In *Alton's case*, a servant took a ticket and travelled on a railway, and was injured on his journey through the negligence of the railway company. The master brought an action against the company for the loss of his servant's services through their negligence; but there was no contract between the railway company and the master. Held, that inasmuch as the servant was injured, not by a simple wrong, but by a wrong arising out of a breach of duty imposed on the railway company by their contract with the servant, the action was founded on the contract, and would not lie (*Alton v. Midland Ry.*, 19 C. B. N. S. 213). This case has been severely criticised as being bad law. It is inconsistent with the principles laid down in *Marshall v. Y. N. & B. Ry.*, and *Foulkes v. Metro. Dis. Ry.*, and recently doubts have been thrown on it (see *Taylor v. M. S. & L. Ry.*, (1895) 1 Q. B. 134).

The father of the plaintiff bought a gun of the defendant for the use of himself and his sons, and the defendant warranted the gun to be a good and safe gun. The gun burst while the plaintiff was using it and injured his hand. Held, that there had been fraud and damage, the result of that fraud, from an act contemplated by the defendant at the time of the sale, and that the action was maintainable (*Langridge v. Levy*, 2 M. & W. 519). Where the defendant sold a bottle of hair wash to a husband to be used by his wife, and the latter was injured in using the same; it was held that the duty of the vendor to use ordinary care in compounding the wash extended to the person for whose use the vendor knew it was purchased (*George v. Skivington*, 39 L. J. Ex. 8). A built a coach for the Post-Master General, B horsed it and hired C as a coachman to drive it. The coach broke down from a defect in the building. Held,



that C could not sue A (*Winterbottom v. Wright*, 10 M. & W. 109). In this case neither was it alleged that the defendant *knew* the coach to be unsafe, nor was any *bad faith* or *negligence* proved on his part, otherwise the result would have been different.

The plaintiff sued for injuries resulting from the fall of a chandelier in a public house. The declaration alleged that defendant wrongfully, negligently and improperly, hung a chandelier in the public house, knowing that the plaintiff and others were likely to be therein, and under the chandelier, and that the chandelier, unless properly hung, was likely to fall upon and injure them; and that the plaintiff being lawfully in the public house, the chandelier fell upon and injured him. It was held that notwithstanding the form of the declaration the case fell within the principle of *Winterbottom v. Wright*. It was conceded, however, that if there had been an allegation that the defendant *knew* that the chandelier was *improperly* hung, the action might have been maintained (*Collis v. Selden*, L. R. 3 C. P. 495). So, if a surgeon treat a child unskillfully, he will be liable to the child, even though the parent contracted with the surgeon (*Pippin v. Shephard*, 11 Price 400). Where mortgagees lent money, by instalments to a builder, on the faith of certificates *negligently* granted by the defendant, who was a surveyor appointed not by the mortgagees, but by the builder's vendor, and the certificates were inaccurate and the mortgagees thereby suffered loss for which they claimed compensation from the defendant; it was held that as there was no contractual relation between them, the defendant owed no duty to the plaintiffs and the action could not be maintained. It was urged that a certificate *carelessly* issued was as dangerous as an ill-made gun, or a poisonous hair-wash, and that on that ground the defendant was liable, but the Court would not admit the analogy. If the certificate had been *fraudulent*, i. e., issued with intent to deceive the plaintiff, then independent of any contractual relation, the defendant would have been liable (*Le Lievre v. Gould*, (1893) 1 Q. B. 491).

### III. *Causes of action in tort dependant on a contract not between the same parties.*

(a) **Procuring a breach of contract.**—The principles laid down in *Lumley v. Gye*, *Bowen v. Hall*, and in the recent case of *Quinn v. Leatham*, show that A may, in some circumstances, sue B, if B procures C to break his contract with A. Thus, a contracting party may, indirectly through the contract, though not upon it, have an action

against a stranger. (For a full discussion of this subject see Chapter XIV).

(b) **Damage to stranger by breach of contract.**—A breach of contract between contracting parties will not enable a stranger to sue one of the parties for the injury done to him through the breach. This clearly appears from the cases in which telegraph companies have been held not liable to the receiver of a telegram for its erroneous transmission. These cases have been decided upon the express ground that the contract to transmit the message is made with the *sender* and not the receiver, and that outside the contract there is no statutory or other duty incumbent upon the telegraph company to transmit a message correctly (*Ball*).

Where an action for negligence was brought against the company by a person to whom a telegram had been erroneously transmitted, it was held that the action did not lie on the ground that the obligation of a telegraph company to use the due care and skill in the transmission of message arose entirely out of contract; and that the defendant's charter had not affected the relation of the company to the sender or the receiver of a despatch, and that, therefore, the contract having been made with the sender of the message, the plaintiff had no right of action (*Playford v. A. K. Telegraph Co.*, L. R. 4 Q. B. 706). In *Dickson v. Reuter's Telegraph Co.* (2 C. P. D. 62), the above decision was upheld, and it was said that no action would lie against a telegraph company, at the suit of the receiver, for the misdelivery of a telegram, unless either there was a contract between him and the company, or (possibly) fraud on their part in the transmission of it. Where the defendant, whose business it was to collect and forward telegrams, had negligently omitted to forward one which was in cipher, and so unintelligible to him; the sender, it was held, could recover nominal damages and not a loss of commission which was consequent upon the omission (*Sandars v. Stuart*, 1 C. P. D. 326). The telegraph companies in general limit their responsibility by special conditions, which by some of their incorporating Acts must be reasonable (*Mayne*).

In America, on the other hand, one who receives a telegram which, owing to the negligence of the telegraph company, is altered or in other respects untrue, is invariably permitted to maintain an action against the telegraph

company for the loss that he sustains through acting on that telegram. Sir Frederick Pollock is of opinion that the American decisions are on principle correct.

**Damages.**—The damages in actions of tort founded upon contract must be estimated in the same way as they are estimated in a breach of a contract (*Chimery v. Viall*, 5 H. & N. 295).



## APPENDIX.

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### *Questions.*

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#### CHAPTER I.

1. WHAT is a tort?
2. State the necessary constituents of a tort.
3. In what respects does a tort differ from a contract and from a crime?
4. Give an instance of a transaction which is at the same time a tort, a crime, and a breach of contract.

Classify the grounds on which a person may be held liable for tort.

5. Explain the distinction between injury and damage. Which of these are essential in an action for tort? Discuss the question and give examples.

6. What do you understand by *damnum* and *injuria*? Give instances of *damnum sine injuria*, *injuria sine damno*, *damnum et injuria*, and state which of them does or does not give a right of action.

7. Explain the proposition "an injury imports a damage."

---

#### CHAPTER II.

8. State the distinction between damage and damages.
9. Mention the classes of cases in which there is no actionable wrong unless a special damage is proved; and those in which an action for tort lies, although no actual damage is alleged.
10. How does Lord Campbell define 'malice'? Explain what is meant by 'malice in law.' Cite cases in support of your answer.
11. How far can the motive and intention of a wrongdoer be made elements of judicial consideration?

## CHAPTER III.

12. How far is a minor liable for a tort? Discuss to what extent tenderness of age of infants is immaterial to their liability for torts.

13. Is infancy a valid defence in any and what actions founded on tort, and on what principle?

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## CHAPTER IV.

14. What is the object of the English rule of law that in a case of felony the civil remedy is suspended until the prosecution of the offender criminally? Does this rule of law prevail in India? Does it still prevail in England? Can you mention any recent cases on the subject?

---

## CHAPTER V.

15. Under what circumstances is a wrong-doer liable for torts committed in a foreign territory? Explain fully the law on the subject, and refer to any decided cases you know bearing on the question.

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## CHAPTER VI.

16. Under what circumstances will the plea of Act of State be a good answer to a suit for damages for an act *prima facie* tortious. Mention any leading cases on the subject (1) in England, (2) in India.

17. What is the extent of protection afforded by the Indian law to judicial officers and those who act under their orders against liability for acts done by them in the course of their official duties? Point out the distinction, if any, between the Indian and the English law on the subject.

18. What are the liabilities of a judicial officer for false attachment?

19. How far is a man liable to another for harm done by him, to the latter, through accident?

20. Can a wrong-doer sue for wrong done to himself, and if so, in what cases?

---

## CHAPTER VII.

21. Explain the meaning and application of the maxim

*actio personalis moritur cum persona* with reference to torts. What exceptions to it are recognized by statutes in England and in India?

22. Under what circumstances does the liability for a wrong devolve upon the representatives of a wrong-doer, and the right of action in respect of the wrong survive in favour of the representatives of the injured person?

23. In what cases may an action be brought in England against the representatives of a deceased tort-feasor? In what cases may the executor of a deceased person sue for torts done to the deceased in India?

24. What are the principal provisions of Lord Campbell's Act? What is the law in India?

---

#### CHAPTER VIII.

25. In what classes of cases, and on what grounds may one person sue and be sued for a tort committed to and by another?

26. What are the requisites of a valid ratification of tort?

27. Can a person ever be made liable for damage which is not the legal consequence of his act, and, if so, when?

28. How would you qualify the statement that master is liable for the torts of his servant?

29. What is the law with regard to the liability of a principal for the tortious act of his agent?

30. What limitations are there to the maxim *respondet superior*?

31. When is a master held liable and when not

(a) to a third party for the wrongful act of the servant?

(b) to a servant for the wrongful act of a fellow-servant.

(c) to a servant for the wrongful act of the master himself?

32. Under what circumstances is a person employing a contractor liable for the contractor's wrongful acts?

33. What is the liability of a husband for the torts of his wife.

---

## CHAPTER IX.

34. What in general is the measure of damages in cases of tort?

35. Damages are of three kinds. Explain concisely the differences between them and illustrate by example. What kind of damages should be awarded in the following cases :—

(1). In an action for assault.

(2). In an action against a Railway Company for damages done to goods.

(3). In an action against a Railway Company for injuries to the person arising from the company's negligence.

(4). In an action for libel.

(5). In an action for seduction.

36. Upon what principles are damages assessed in actions of torts of different classes? State how far such principles are in conformity or otherwise with the rules which determine the measure of damages in actions for breaches of contract.

37. "According to the nature of the case an award of nominal damages may be honourable or contumacious to the plaintiff?" Explain what is here meant.

38. Give instances of cases in which exemplary damages may be awarded.

39. Are there any distinctions between the principles upon which damages are given in actions of contract and in actions of tort?

40. In actions for torts too remote damages will not be awarded. Discuss this question and give examples.

41. In what circumstances can prospective damages be awarded.

42. When will a Court grant an injunction?

43. Mention the qualifications which have been engrafted on the rule that one wrong-doer cannot claim contribution from another. Give examples.

44. A joint-decree is passed against A and B in consequence of a tort committed by them. Under what circumstances will they have a right of contribution against each other; and what will be a successful defence in a suit brought to claim such a contribution?



45. A doctor travelling by railway is injured in an accident. Under what circumstances will he get damages from the company, and if he is awarded heavy damages on the ground that he is permanently disabled from practising, has the company any remedy if he afterwards recovers sufficiently to carry on his profession? If he get damages for temporary disablement and afterwards becomes totally disabled, can he bring a fresh action?

---

#### CHAPTER X.

46. Classify torts according to their nature. Give an instance of each class and show why such classification is of importance.

47. Enumerate and explain the different forms of trespass to the person.

48. Classify the torts recognized in English law according to the moral character of the act.

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#### CHAPTER XI.

49. Mention the several valid defences which may be set up to an action for damages for assault?

50. Under what circumstances will a plea of self-defence be an answer to an action for assault?

51. Explain the expression *son assault demesne*.

52. How far, if at all, will the plea avail in an action for assault and battery that the plaintiff first assaulted and commenced the fight?

53. In what cases is a mere menace actionable?

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#### CHAPTER XII.

54. What defences may be made to a suit for false imprisonment?

55. Compare the powers of a constable with those of a private individual under the Common law of England to make an arrest in cases of felony and affray.

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#### CHAPTER XIII.

56. State in which respects the liability of a person for defamation in an action of tort differs from the liability in a criminal prosecution.

57. What constitutes libel and slander? What is the law in regard to actions for damages arising therefrom in the Presidency towns and in the Mofussil?

58. What is the difference between libel and slander? What proofs must be adduced by the plaintiff to prove his case in a suit for libel, and how may the defendant defend himself?

59. It is a rule of law that verbal slander must have caused actual damage in order to be actionable. State the exceptions, if any, to this rule and the reason for the exception, illustrating your answer by examples.

60. What place has "malice" in the law of libel? Under what circumstances is proof of actual malice necessary in an action for libel? When may malice be inferred? When must it be proved?

61. In what cases is a man liable for reckless assertions made by him?

62. What defences are available to a defendant in an action for libel, and what circumstances either aggravate or mitigate the wrong?

63. Under what circumstances will untrue words written and published on a privileged occasion be actionable and not actionable respectively?

64. Discuss the saying "The greater the truth the greater the libel."

65. What is a privileged communication? Give the principal instances of privileged communications.

66. Point out the difference between absolute privilege and qualified privilege in an action for libel.

67. Explain whether and why the following facts are good defences in an action for libel—

(a) The truth of the libel.

(b) The *bona fides* of the author of the libel.

(c) The fact that the libellous words were first spoken by another.

68. Under what circumstances will the following be good defences in suits for defamation—

(a) That it was made by the defendant when acting as counsel in a Court of Justice.

(b) That it was a comment on the public conduct of a public officer.

(c) That it was made in protection of the defendant's own private interests.

69. Will an action lie against a witness for uttering, in the course of his evidence, false and malicious statements against a party to a suit, and thereby causing him damage?

#### CHAPTER XIV.

70. What kind of damages are allowed in actions for seduction, and on what grounds?

71. What is the measure of damages in an action for loss of service by result of the defendant's seduction of the plaintiff's daughter? State also what circumstance or circumstances will aggravate the wrong and increase the measure of damages.

#### CHAPTER XV.

72. Explain the term "Slander of title" and state what facts must be proved by the plaintiff in an action for the same.

73. What was the old law regarding action for "Slander of title," and explain the gradual development of this branch of the law, quoting the leading cases thereon?

74. What must be proved in order to enable the plaintiff to recover damages in a suit for malicious prosecution? What is the difference between 'false imprisonment' and 'malicious prosecution'?

75. Are the following defences to an action for malicious prosecution valid? Give reasons for your answer.

(a) There was reasonable and probable cause for the prosecution although the defendant knew that the plaintiff was innocent.

(b) The defendant honestly though ignorantly believed that the plaintiff was guilty although there was no probable cause for the prosecution.

76. State in what circumstances, if at all, an action will lie for the malicious prosecution of civil proceedings.

77. Is the malicious prosecution of civil proceedings against a person actionable? If so, what should be established

in such an action, and if not, what is the remedy, if any, provided by law ?

78. Give a short history of the origin, the gradual development, and the modern doctrines of law, as settled either by decided cases, or statutory enactments in respect of actions for injuries arising from fraudulent combinations and conspiracies whether by false prosecutions or otherwise.

79. Under what circumstances will an action lie for procuring a third person to break his contract with the plaintiff ? What objection exist to allowing such an action ? Can it be maintained in India.

---

## CHAPTER XVI.

80. Define possession, and state what is the law in regard to the acquisition of possession by a trespasser, and the right of the landowner to expel the trespasser by force, or forcibly to re-enter on the land ?

81. Write a short note upon what constitutes a trespass upon a real property and in what respects it differs from a criminal trespass.

82. In what respects is a licensee in a better position than a trespasser, and in a worse position than a person present on lawful business when he sustains injury upon the premises of another ?

83. Can there be trespass committed by one tenant-in-common against another, and if so in what cases ?

84. What are the injuries to real property in respect of which

(a) The tenant can sue the wrongdoer.

(b) The landlord can sue the wrongdoer.

(c) Both the landlord and the tenant can sue the trespasser ?

Illustrate your answer by examples.

85. How may a landlord be guilty of trespass in distraining for arrears of rent due to him ?

86. How far is force justifiable (1) to prevent, or (2) to remedy, trespass to land ?

87. In an action for trespass

(a) State with reasons, under what circumstance or circumstances, if at all, will the plea of *jus tertii* prevail or fail.

(b) And, mention what other defence or defences may be available.

88. Within what limits does the right of self-defence excuse an act which would otherwise amount to a trespass ?

89. What is meant by (1) an action for trespass ; (2) an action of ejectment ?

90. State fully in what cases a sheriff may justify breaking open the outer doors of a dwelling house in order to execute a writ.

91. What rule is adopted in the awarding of damages for injury to property ?

92. What is meant by trespass *ab initio* ? Explain fully the law on the subject and refer to any decided cases you know bearing on the question.

93. What important principles were laid down in the *Six Carpenters' case* and in *Semayne's case* ? State the qualifications with which they are applied.

94. What rights, if any, has A (i) to have his land supported by that of his neighbour, (ii) to have his building supported by his neighbour's land, (iii) to have his land and building supported by the land and buildings of his neighbour, (iv) to have his land or buildings supported by the subterranean water under his neighbour's land ? Quote any cases you know of on these points.

95. A dug a trench close to the boundary of B's land. B's buildings were injured by consequent subsidence of the soil. Discuss the liability of A for the injury so done.

96. Where the surface and sub-soil of land are vested in different persons, what reciprocal obligations does the law impose on these persons ? Cite cases on this point.

97. What are the rights of riparian proprietors on the same and on different sides of a fordable stream ?

98. Underneath a large tract of land there is a quantity of subterranean water. The owners of the surface have wells of various depths by means of which the water can be raised to the surface. What are the rights and duties of those owners

among themselves in respect of their use of their respective wells ?

99. Point out the distinction between the right of a man to water flowing in a natural channel through his land, and water reaching it through an artificial water-course.

100. State the nature and extent of rights to appropriate the water of—

(i) natural streams running in defined channels above ground.

(ii) underground water running in defined currents.

(iii) underground water percolating through the soil.

(iv) surface water running in no defined channel.

Cite leading cases in regard to subterranean water.

101. Explain the expressions 'disturbance of common,' 'disturbance of market,' 'a several fishery.'

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## CHAPTER XVII.

102. Define conversion. Mention the facts which the plaintiff is bound to establish in an action of trover.

103. Explain the distinction between an action for the wrongful detention of goods and an action for conversion of goods.

104. In what cases is an innocent purchaser of goods held liable for conversion ?

105. What is meant by (1) action of *trover*, (2) action of *detinue*, and (3) action of *replevin* ?

---

## CHAPTER XVIII.

106. What monopolies exist in British India, and what acts constitute violations of the rights respectively ?

107. What are the essentials of a right to the use of a trade-mark ?

108. To what limitation is the the right of property in the use of a trade-mark subject ?

109. What is necessary to constitute a piracy of a trade-mark ?

110. What must the plaintiff prove in  
(i) a suit for damages, and

- (ii) a suit for an injunction, for an infringement of his right to trade mark ?

---

### CHAPTER XIX.

111. What is an action for deceit ? What are the facts necessary for a plaintiff to prove in order successfully to sustain an action for deceit ?

112. When will an action lie in cases of fraudulent statements and fraudulent silence ?

113. In an action of deceit, explain the liability, if any, of a principal in respect of a representation voluntarily made by the agent, stating the grounds for the existence or non-existence of any liability

(i) Where the representation is false within the knowledge of the principal, but not of the agent.

(ii) Where the representation is false within the knowledge of the agent, but not of the principal.

114. What are the duties imposed upon a person who offers goods for sale ?

---

### CHAPTER XX.

115. "What would be a nuisance in one locality may not be one in another". Comment briefly upon the accuracy of this proposition.

116. What is the law in regard to a private individual's right of action in respect of a public nuisance which causes damage to him ?

117. Distinguish between a private and a public nuisance, and state the facts which the plaintiff is bound to prove in an action for nuisance.

118. What is the distinction between trespass and nuisance ? Can the same act amount to both, and if so, give instances ?

119. When can a reversioner sue the wrong-doer in cases of nuisance ? Give instances.

120. State the nature and extent of the civil liability of landlords and tenants upon the demised premises.

121. What is the law with regard to the respective liabi-

lities of the landlord and tenant in respect of injuries sustained by a stranger resulting from the premises being out of repair?

122. On what principle are damages usually assessed in cases of continuing nuisance?

123. What is meant by a "continuing injury"? What modes of redress can the injured person exercise in respect of it?

---

### CHAPTER XXI.

124. Define Negligence. Criticise the definition given by Baron Alderson.

125. What are the principle rules regarding liability for breaches of a statutory duty towards the public? Does the fact that a statute provides a particular remedy for its breach entirely take away the right of action?

126. How far can a railway company, sued for damages caused by the working of its line, shelter itself behind the authority conferred on it by the legislature? Illustrate your answer by a few well-known cases.

127. What is meant by contributory negligence?

(a) In what circumstances, if at all, is the contributory negligence of a third party not a good defence?

(b) In what circumstances, if at all, is the contributory negligence of the plaintiff not a good defence?

Upon what general principles are cases involving questions of contributory negligence by children decided?

128. Explain the doctrine of 'identification' and state how it has been affected by recently decided cases. What is the true rule in cases where damage has been sustained by the concurrent negligence of two or more persons.

129. State the class of cases wherein contributory negligence would afford no excuse in an action of tort for damages. What is the law when a danger is caused to a child—

(a) By the negligence of its parent or guardian;

(b) By the child itself independently of any negligence in its parent or guardian?

130. Is an owner of land, upon which water is stored, liable, and, if so, to what extent, for injury caused by the escape of such water?



131. Three persons, a guest, a servant, and a friend, of the master of an hotel enter it at the same time and are injured by the accidental falling of a beam. What liability does the master of the hotel incur?

132. Explain what is meant by a common carrier, and the extent of his liability for damage or loss to goods.

133. What is the Common law liability of carriers, (1) by land, and (2) by sea?

134. What is the liability of carriers of passengers?

135. State shortly the nature and extent of the liability of Railway companies as carriers (1) of goods, (2) of passengers.

136. Compare and contrast the liabilities of a common carrier with those of an ordinary carrier for hire.

137. What is the difference between the liability of inn-keepers and that of lodging house keepers for the loss of the goods of a guest and lodger respectively?

138. What is the liability of persons keeping animals either wild or domestic for injuries done by them?

139. Had the lions in Mr. Fillis' circus escaped during a railway accident and done damage, could the persons damaged have recovered (1) from Mr. Fillis, (2) from the Railway company? Give reasons for your answer.

140. Discuss the liability of a man on whose property a fire breaks out for damage which that fire may cause to his neighbour.

141. Through the negligence of the servants of the tenant of a house, the house is set fire to and burnt down. Is the tenant liable to the landlord for the damage done?

142. Explain what is meant by *scienter*.

143. In which of the following actions can a man succeed, and why? and what must he prove in each in order to succeed?

(1). Against the owner of a dog which has bitten him.

(2). Against the owner of a monkey which has escaped from custody and injured him.

(3). Against the owner of a runaway horse which has knocked him down.

(4). Against a railway company where he has sustained injury from an accident by a defect in the wheels of the carriage in which he was a passenger.

## CHAPTER XXII.

144. Explain the term "tort founded on contract." Give instances.

145. Is privity necessary to support an action in tort?

146. "Wherever a duty is imposed on a person by contract or otherwise, and that duty is violated, any one who is injured by the violation of it may have a remedy against the wrong-doer." Comment on this proposition, and quote any cases you know in illustration.

147. When does it happen that one and the same set of facts give rise both to an action in contract as well as in tort? Show how fraud may give rise to such an alternative remedy.

148. Illustrate by examples that the law of contracts and of torts may afford concurrent remedies, in the alternative, to the injured party in respect of the same wrongful act of the defendants.

149. Give two examples—

(a) of a tort arising out of a breach of contract but yet independent of it ; and

(b) of a tort involving the breach of a contract but yet independent of it.

150. When, if ever, is one railway company liable for accidents happening on another company's line? Give reasons.

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which they had to deal. To persue in detail cases which range from the unauthorized tyranny of Colonial governors to the infraction of copyright, from the keeping of bull-dogs to defamation, would of course be profitless and impossible within the limits of a review. We can only congratulate the authors upon the thoroughness with which they have carried out their scheme. Under every title will be found the leading cases which have defined the law thereto appropriate. Principles are invariably given their due prominence, and are exemplified with enough but not too much detail."

"**Bombay Gazette**" (6th November 1897) :—"The work combines a clear exposition of the principles of the English Common law and of the Indian case-law as they have both been practised in the various High Courts of this country. The compilers have worked in an orderly, systematic manner. First, the principles of the Law of Torts are given in as concise and perspicuous a form as possible, and then follow cases in point, both English and Indian. . . . There is no room to doubt the book's being up-to-date. In all two thousand cases are cited. These can hardly fail to afford precedents to the practitioner, or leading illustrations for the student. Cognate cases have been grouped together, and important cases have their names conspicuously printed so as to catch the searcher's eye at once. The writers have utilized all existing treatises on the Law of Torts in the compiling of this comprehensive work, and they have taken much pains, not without a considerable measure of success, to ensure clearness, completeness, and orderly arrangement, essential points in a work of law. The authors are justly proud of the fact that this volume brings for the first time under one cover the principles and practice both of the English Common law and the Indian case-law. The differences in the law in the two countries in regard to torts are brought clearly into prominence. . . Analytical tables simplifying the subject matter, and brief summaries of fundamental principles are given at various places in the book. In the appendix are grouped, in the order of the chapters, questions on the Law of Torts set at the Pleaders' and the University law examinations held in the different Presidencies during the last twenty years. These will practise the student in formulating replies to possible questions, and will also help him to test his own progress periodically, in his law studies. The work is on such lines that it should form a valuable text-book on the subject in Indian law schools."

"**Champion**" (13th March 1898) :—"We have ourselves gone through it with care, and have no hesitation in saying that the plan of the work is excellent and the exposition of the principles is interesting and generally accurate. The general get-up is all

that can be desired, and the volume is moderately priced, having regard to the time and labour that must have been bestowed upon it. The contents of the book bear ample testimony to patient industry and careful study on the part of the authors, and we have not the least doubt that the compilation will be found very serviceable to students of law and members of the legal profession."

**"Phoenix"** (29th December 1897):—"The plan which the authors have adopted of giving the principles and illustrating them with *apropos* cases, English, Indian and American, seems an admirable one. The principles are well and clearly expressed, and the arrangement is logical and comprehensive. The case law has been brought down to a very late date with scrupulous care, and the conflicting opinions of the different Indian High Courts on some particular points have been clearly brought into prominence. We are much pleased with some of the salient features of this volume, *viz.*, the classified tables, brief summaries for recapitulation, names of leading cases in bold types, and grouping of cases having cognate subject matter. The formidable array of authorities consulted, and the table of cases cited reveal a vast amount of industry and study. . . . The Index is copious, and the printing and get-up are excellent. We have nothing but praise for this work, which is commendable as well for originality of treatment and arrangement as for labouriousness, and we shall not be surprised if in course of time it takes rank as a work eminently fitted to be a text-book for students and a convenient and trustworthy guide for the profession. It has indeed filled remarkably well a serious chasm in Indian legal literature, and looking to its extremely moderate price we are confident that it will rapidly find its way into the shelf of every student. No such treatise has hitherto existed, and we heartily congratulate the learned authors on having rendered such excellent service to the Bench, the Bar and the law student."

**"Gujrati"** (7th November 1897):—"This work lucidly presents the English and the Indian law side by side, and also indicates the divergent views held by the Indian High Courts on particular points. There are in all 22 chapters dealing with the main branches of the law of Torts, and the latest cases decided by the English and Indian High Courts have also been incorporated. A careful examination of the contents of the book cannot but convince anyone that it must have cost its authors laborious study of different standard works on the subject. The appendix contains a large number of very useful and suggestive questions, specially intended for students. On the whole we feel no doubt whatever that the book will prove very serviceable to the bench and the bar as well as to those who wish to study for the University and High Court law examinations."

